No. _____

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

EARL J. PARKER, JR.; GLENN C. REDMON,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; FARRELL LINES, INC.; ROYAL INSURANCE CO.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Fourth Circuit err in deciding that the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq., applies only to a site physically contiguous with and actually touching the navigable waters of the United States?

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Decision of Administrative Law Judge Richard K. Malamphy, dated December 30, 1991: Redmon; Parker v. Farrell Lines, Inc. & Royal Ins. Co., ALJ Nos. 90-LHC-2369, 91-LHC-467 (1991).

STATEMENT OF JURISDICTION

The immediate case arose under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. ("LHWCA" or "Longshore Act" or "Act"). The Administrative Law Judge of the U.S. Department of Labor had jurisdiction to hear the claims, and the Benefits Review Board had jurisdiction to hear the appeal therefrom, under Sections 919(c) & (d) and Section 921(b)(3) of the LHWCA. The U.S. Court of Appeals for the Fourth Circuit had jurisdiction to hear the appeal from the Benefits Review Board pursuant to Section 921(c) of the LHWCA. The decision of that court was rendered on February 9, 1996. A sua sponte Suggestion of Rehearing en banc was raised subsequent to the rendering of that decision. That Reconsideration was denied by the Court of Appeals by Order filed on March 14, 1996.

This Court has jurisdiction to review the decision of the Court of Appeals for the Fourth Circuit by way of certiorari under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

33 U.S.C. Section 903(a):

Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

STATEMENT OF THE CASE

This matter involves two claims for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. ("LHWCA" or "Longshore Act" or "Act"). The matter was heard before Administrative Law Judge Richard K. Malamphy of the United States Department of Labor to determine whether there was jurisdiction under the Longshore Act with respect to injuries suffered by Petitioners, Earl J. Parker, Jr. and Glenn C. Redmon, while working for Respondent Farrell Lines, Inc. ("Farrell") at its 24th Street Facility in Norfolk, Virginia.

Farrell owns ships that transport containerized cargo to and from various ports, including Norfolk International Terminal (NIT) in Norfolk, Virginia. In

addition, Farrell owns various containers for purposes of transporting such cargo. In that regard, Farrell leases a facility at 901 West 24th Street in Norfolk for purposes of performing container inspection and repair work as part of its shipping operations. While Farrell originally performed all such inspection and repair tasks at a site it leases at NIT, expansion of the terminal in 1980 resulted in the termination of a portion of Farrell's lease, thereby forcing the majority of Farrell's operations to an off-terminal facility. While the 24th Street facility is located approximately five miles from NIT and one mile from navigable waters, the site, at the time of the terminal's expansion, was the closest available site to the terminal. The site was also chosen due to the fact that it had formerly been used by another container repair company and was therefore well-suited to the shipping operations performed by Farrell.

In carrying out Farrell's shipping operations, one Farrell employee is permanently assigned to the NIT facility, while additional employees are called from the 24th Street location to NIT, usually on a daily basis, to deliver parts, conduct repairs, and make inspections. A single manager is responsible for repair activity at both sites and coordinates the routine transport of personnel between them.

Petitioners Parker and Redmon, an inspector and a container mechanic, respectively, were injured while working at the 24th Street facility. The parties below stipulated that Petitioners were engaged in maritime employment at the time of their injuries and that they therefore met the jurisdictional status requirement under the Act. The sole issue below was whether the workers met the situs requirement for jurisdiction under the Act.

Judge Malamphy issued a Decision and Order on

December 30, 1991 denying compensation benefits to Petitioners because he found that the locus of Petitioners' injuries did not meet the situs test for coverage under the Longshore Act (App.C. at XL).[2]

Petitioners requested review before the Benefits Review Board of the U.S. Department of Labor. The Board issued a Decision and Order, dated October 26, 1994, affirming the decision of the Administrative Law Judge. The Board determined that the container repair facility in question was not a covered situs under the jurisdictional requirements of the LHWCA (App.B. at XXX).

Petitioners requested review before the United States Court of Appeals for the Fourth Circuit. In an Opinion, written by Judge Williams, a panel of the Court of Appeals affirmed the decision of the Benefits Review Board and held that the locus of Petitioners' injuries was not a covered situs under the LHWCA. In that respect, the Court of Appeals determined that it was bound by the recent decision in Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. 1995) (hereinafter "Sidwell"), in which a separate Fourth Circuit panel held that "an area is 'adjoining' navigable waters only if it 'adjoins' navigable waters, that is, if it is 'contiguous with' or otherwise 'touches' such waters.[]" Id. at 1138-39 (footnote omitted). That decision further established that "[i]f there are other areas between the navigable waters and the area in question, the latter area simply is not 'adjoining' the waters under any reasonable definition of that term." Id.

In keeping with the Sidwell panel's restrictive

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[2] Page citations referenced by "App." will refer to the various Appendices attached to the immediate Petition for Writ of Certiorari.

interpretation of "other adjoining area" for purposes of the LHWCA situs determination, the Court of Appeals panel in this case determined that the 24th Street facility could under no circumstances be a covered situs under the Act. In that regard, the court stated:

> Under Sidwell's cogent explanation of the statutory language, the dispositive question of whether the 24th Street site is a maritime situs involves a straightforward geographical determination: either the 24th Street site adjoins navigable waters and is a maritime situs, or it does not and is not. Because the 24th Street site neither is contiguous with navigable waters, nor touches such waters, nor is located within the boundaries of NIT, it cannot be a maritime situs under the LHWCA.

Parker, 75 F.3d 929, 933 (App.A. at VII). The panel went on to note:

> That Farrell was compelled to relocate to the 24th Street site by expansion of NIT does not affect our decision, nor does it matter that some Farrell employees occasionally travel between NIT and the 24th Street site. As we explained in Sidwell, the relevant inquiry is whether the situs upon which the injury occurred is a maritime situs . . . .

Id. (App.A. at VII).

In a concurring Opinion, Judge Murnaghan voiced his disagreement both with the restrictive holding of the Sidwell panel and with the resulting finding that Petitioners herein were not injured in an "adjoining area." In support of his position, Judge Murnaghan

initially stated his belief that the Sidwell panel's "interpretation of the LHWCA's phrase 'other adjoining area' is entirely at odds with the meaning that Congress intended [courts] to ascribe to it." Id. at 935 (App.A. at XIV). In support of that conclusion, Judge Murnaghan cited the legislative history of the 1972 amendments to the Act, which expresses an unequivocal concern for the lack of uniformity in coverage under the pre-amendment Act. Id. at 937-38 (App.A. at XVII-XXI). In addition, Judge Murnaghan pointed to the policy of liberal construction embodied in the Act in order to effectuate its remedial purposes, as enunciated in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268 (1977). In keeping with both this construction and the clear desire for broadened, yet uniform, situs coverage under the Act as amended, Judge Murnaghan intimated that a "functional" approach to situs coverage is appropriate, as opposed to the hard-line and restrictive approach enunciated in Sidwell. Parker, 75 F.3d at 938-40 (App.A. at XXI-XXIV). Indeed, he noted that, as highlighted herein, the Sidwell ruling runs directly contrary to rulings from various other federal circuits. Id. at 939. Further, Judge Murnaghan highlighted the fact that the Fourth Circuit had in fact employed such functional approaches in the past in cases such as Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), cert. denied, 485 U.S. 1028 (1988), and Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978). Specifically, he cited Humphries for the proposition that a "situs 'need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime' operation' for it to be within the LHWCA's scope." Parker, at 75 F.3d at 938 (App.A. at XXIV) (citing Humphries, 834 F.2d at 373).

Finally, even aside from his concern with the conflict the Sidwell test creates with other circuits and with prior Fourth Circuit precedent, Judge Murnaghan pointed to the specific language utilized in the Act as amended. He noted that "adjoining" means "touching or bounding" or being "near in space." Parker, 75 F.3d at 939 (App.A. at XXIV) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 27 (1981)). In light of this definition, he stated:

> Recognizing our duty to interpret the statute broadly so that Congress's remedial objectives may be achieved, . . . we should hold that the phrase 'other adjoining area' does not require that an area be contiguous with navigable waters for that area to be covered by the LHWCA.

Id. (App.A. at XXIV) (internal citation omitted).

Ultimately, however, Judge Murnaghan recognized that a panel of Fourth Circuit judges may not overrule a prior published panel opinion. Parker, 75 F.3d at 935 (App.A. at XXIII) (citing Norfolk & Western Ry. v. Director, OWCP, 5 F.3d 777, 779 (4th Cir. 1993)). Accordingly, Judge Murnaghan stated:

> Though I do so with great reluctance, I must therefore regard as binding the opinion filed for publication in December 1995, in Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. 1995).

Parker, 75 F.3d at 935 (App.A. at XXIII). Thus, in light of the controlling nature of that decision, Judge Murnaghan concluded by stating:

> I have rambled on at some length to explain why the Sidwell case which we must follow is on shaky ground. What I have set forth

here will only have relevance, however, if Sidwell or the instant case is reheard en banc or if certiorari is granted in either case by the United States Supreme Court.

Parker, 75 F.3d at 941 (App.A. at XXIX).

Petitioners now seek the review of this Honorable Court. Petitioners further request that the immediate Petition be consolidated with the petition filed with this Court in Sidwell v. Express Container Services, Inc., No. 95-1569, for purposes of consideration by the Court, since the issue presented by both cases is identical.

REASONS FOR GRANTING THE WRIT

I. *The decision of the Court of Appeals in this case is in direct conflict with the decisions of the Courts of Appeals in three other judicial circuits.*

Section 3(a) of the LHWCA establishes the jurisdictional requirements for coverage under the Act. The provision provides for coverage for disability to or death of an employee where the injury occurs "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. Section 903(a). The descriptive language in the parentheses was not contained within the provision as originally enacted, but instead was added through the 1972 amendments to the LHWCA. In the Senate and House Committee Reports corresponding to the addition of this language, Congress indicated that the intent behind the addition of the language was "to permit a uniform compensation

system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 12-13 (1972) (emphasis added); H.R. Rep. No. 92-1141, 92nd Cong., 2d Sess. (1972) (emphasis added), reprinted in 1972 U.S.C.C.A.N. 4698, 4707-08. Accordingly, although the Act did not previously cover injuries occurring on land, Congress altered the language to provide for such coverage. In doing so, the Senate Report enunciated the belief embodied in the amendment "that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." Id.[3]

Courts interpreting the jurisdictional reach of the LHWCA subsequent to the 1972 amendments have uniformly interpreted the Act as requiring both "status" and "situs" in order to invoke the coverage of the Act. See, e.g., Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 264-65 (1977). The former refers to the nature of the work generally performed by the employee in question and is governed by the definition of "employee" in Section 902(3) of the LHWCA and the use of that term in Section 903(a) of the Act. The latter, which is at issue in this case, refers to the actual location where the injury occurred and its relationship to the navigable waters of the United States.

While generally uniform with respect to the

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[3] As highlighted above, Judge Murnaghan, in his concurring opinion, noted that "[t]he Supreme Court has acknowledged Congress's desire to remedy the fact that many workers, during the course of the work day, passed in and out of LHWCA coverage prior to the 1972 Amendments." Parker, 73 F.3d at 937 (App.A. at XX) (referencing P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 75, 62 L.Ed.2d 225 (1979)).

existence of the status and situs tests, courts interpreting and applying the situs requirement have invariably utilized very divergent tests to determine whether a given claimant is covered under the Act. The most prominent, prior to the restrictive test delineated in Sidwell, were the tests enunciated in the cases of Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978), and Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981).[4]

In the 1978 case of Brady-Hamilton, the Court of Appeals for the Ninth Circuit delineated a situs test which mandated consideration of four factors in making the situs determination: (1) the particular suitability of the site for maritime purposes; (2) whether adjoining properties are devoted primarily to uses in maritime commerce; (3) proximity to the waterway; and (4)

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[4] Note that the U.S. Court of Appeals for the Third Circuit enunciated an additional situs test in the case of Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629 (3d Cir. 1976). In that case, the court stated that "[a]s long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available[, because] [r]esuscitating the situs requirement in cases satisfying the status test [would] interfere with Congress' intention to eliminate the phenomenon of shifting coverage." 540 F.2d at 638. In keeping with that standard, the Sea-Land court appeared to favor a case-by-case approach whose focus is not the geographic relationship with the navigable waters of the United States, but the "location of the interface between the air[,] land and the water modes of transportation." Id. at 638.

In Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 264-65 (1977), the Court noted that the Sea-Land test "appears to have essentially discarded the situs test." Id. at 277 n.40. Accordingly, the case is noted for illumination of the lack of uniformity among the circuits, but is not further relied upon in the immediate Petition.

whether the adjoining site is as close to the waterway as feasible. 568 F.2d at 141. In doing so, the Ninth Circuit interpreted the "adjoining area" language in Section 903(a) as describing a "functional relationship that does not in all cases depend upon physical contiguity." Id. In addition, the Brady-Hamilton court underscored that a primary consideration in making the situs determination is the extent to which the choice of the site upon which the injury occurred was governed by considerations of maritime economy. Id. Upon application of the above test, the Brady-Hamilton court held that a contract stevedore's gear lockerman, who was injured while unloading steel plates from a pickup truck parked at a gear locker located 2,600 feet north of a river's edge and 2,050 feet outside of the port's entrance gate, met the situs requirement for coverage under the LHWCA. Id. at 139-41.

Two years later, the Court of Appeals for the Fifth Circuit, in Texports Stevedore Co., established a separate case-by-case inquiry that was to be applied in that jurisdiction when determining whether the situs requirement was met. 632 F.2d 504, 514. In doing so, the court stated:

> [W]e . . . reject the idea that Congress intended to substitute for the shoreline another hard line. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. . . . The site must have some nexus with the waterfront.

Id. The court further stated:

> We reject the position that the presence or absence of nonmaritime buildings between the point of injury and the water is an absolute test for whether an injury is covered under the LHW[C]A. Such a rule would introduce into the tests for coverage a new fortuity that would frustrate the congressional objective of providing a uniform system expanding coverage to landward maritime sites.

Id. at 513. Accordingly, the Texports Stevedore court held that a worker who was injured in a gear room some five blocks from the waterfront in a building which was located as near to the waterfront as feasible and whose operations were part of the ongoing overall loading process met the situs requirement for jurisdictional coverage under the Act. Id. at 515-16.

Most recently, the U.S. Court of Appeals for the Second Circuit cited with approval the approaches taken in Brady-Hamilton and Texports. Triguero v. Consolidated Rail Corp., 932 F.2d 95, 100-01 (2nd Cir. 1991). Specifically, the Triguero court held that the situs test was met where the claimant's injury occurred in a container yard separated from navigable waters by a public street and independent maritime facilities and located approximately one and one-quarter miles from the employer's dockside facility. Id. at 101. In so doing, while not delineating a specific situs test for its own use, the Second Circuit adopted a "functional" approach to the situs requirement in which distance from a navigable waterway or separation from that waterway by roads or property boundaries is not dispositive. See id.

In the face of this precedent, the Court of Appeals for the Fourth Circuit, both in Sidwell and in the

immediate case, adopted and applied yet another situs test distinct from those set forth in the Second, Fifth, and Ninth Circuits. As highlighted above, this test is highly restrictive and limits coverage under the Act within the Fourth Circuit to areas which physically touch the navigable waters of the United States. In so doing, the Court of Appeals specifically determined that if there are other areas between the navigable waters and the area in question, the latter area simply is not "adjoining" the waters within the meaning of the LHWCA. Parker, 75 F.3d at 933 (App.A. at VII-VIII); Sidwell, 71 F.3d at 1138-39. Further, in making this determination, the Court of Appeals explicitly rejected the additional tests utilized by the Fifth and Ninth circuits when making identical determinations under the LHWCA.[5] Parker, 75 F.3d at 933 (App.A. at VII); Sidwell, 71 F.3d at 1138. Likewise, the Court of Appeals introduced and applied a test which (1) develops a hard line approach in direct conflict with the language of the Fifth Circuit's decision in Texports; (2) seemingly focuses the inquiry on property divisions and fence lines in conflict with the approaches delineated by the Ninth, Fifth, and Second Circuits in Brady-Hamilton, Texports, and Triguero, respectively; and (3) fails to account for any of the functional factors outlined by the Ninth Circuit in Brady-Hamilton. In so doing, the Court of Appeals has indisputably illuminated and perpetuated a sharp contrast among the four circuits in the manner in which this element of jurisdictional

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[5] Note that neither the Sidwell court nor the Parker court addressed the Triguero decision.

coverage under the Act is interpreted and applied.[6]

In light of this divergence across these circuits, the immediate case is quite appropriate for review by this Court. As highlighted above, the LHWCA was enacted and amended to provide for uniformity of coverage to similarly situated workers' across differing federal circuits. As it stands, coverage under the Act's jurisdictional situs requirement is no longer determined by the locus of injury and its relationship to the navigable waterways of the United States, but instead by property lines and by which judicial circuit has jurisdiction over that location. This potential for disparate results based upon factors foreign to the letter of the Act clearly calls for resolution of the issue by this Court without delay.

II. *The decision of the Court of Appeals in this case is in direct conflict with prior decisions of other panels of the Court of Appeals for the Fourth Circuit.*

While the Court of Appeals' decision in this case clearly comports with the restrictive standard set forth in Sidwell, the decision is decidedly in contravention of prior precedent within the Fourth Circuit.

Aside from Sidwell, the Court of Appeals for the Fourth Circuit has specifically addressed the situs requirement under the LHWCA on two prior occasions. The first was in Newport News Shipbuilding & Dry Dock

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[6] Indeed, this contrast was noted in Judge Murnaghan's concurring opinion, in which he stated that "this and other circuits have suggested that what the statute requires when it states that the injury must have occurred on either navigable waters or an 'adjoining area,' . . . is a strong functional relationship between such waters and the site of the injury." Parker, 75 F.3d at 939 (App.A. at XXII) (internal citation omitted).

Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), in which the court held that two sites, a submarine shop 1,200 feet from the water's edge and a foundry 3,000 feet from the water's edge, satisfied the situs test because they were "integral parts of the shipyard." Id. at 169. The focus in that case was generally upon the nature of the work performed in the area in question with respect to the navigable waterways of the United States, as opposed to the physical proximity of that area to the water. Indeed, the foundry injury at issue in that case occurred approximately two and one-half blocks from the water's edge at a location which was separated from the water by two public streets. See Jones v. Newport News Shipbuilding & Dry Dock Co., 5 BRBS 323, 324-25 (1977), aff'd Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (1978).

In the case of Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), cert. denied, 485 U.S. 1028 (1988), the Fourth Circuit again addressed the situs issue, citing several factors which, in that case, militated against coverage of the Act. Those factors included (1) that the injury in question occurred well over a mile from the employer's terminal; (2) that the injury occurred along a public highway which did not connect any portions of employer's terminal or traverse continuous or contiguous terminal areas; (3) that, while the restaurant from which the claimant was traveling was arguably located in a waterfront area, it was separated from any navigable waterway or maritime terminal by a residential neighborhood; (4) that the restaurant from which the claimant was traveling was not the closest one to the terminal; and (5) that the restaurant was not an integral part of employer's terminal. Id. at 375. Again, as in Graham, the Humphries court indicated that the proper

inquiry in a situs determination is on the character of the area in which the injury occurs. Id. at 374, 375. Further, the Humphries court stated that a situs "need not be . . . within any specified distance of navigable waters or a 'maritime' operation" to fall within the scope of the Act. See id. at 373.

In contrast to the "functional" focus seemingly established by this precedent, the Court of Appeals, both in Sidwell and in the immediate case, pronounced that the determinative factor in a situs inquiry is whether the area in question actually touches navigable water and whether the area in question is separated from that water in any way, shape, or form. The significance of this alteration in light of its contrast with precedent both within and outside of the Fourth Circuit cannot be ignored. As such, these conflicts require proper redress by this Court.

This conclusion is especially pertinent in light of Judge Murnaghan's concurring opinion in the immediate case. In that opinion, Judge Murnaghan explicitly disagreed both with the restrictive holding of the Sidwell panel and with the resulting finding that Petitioners herein were not injured in an "adjoining area." In so doing, Judge Murnaghan initially cited to the legislative history of the 1972 amendments to the situs provision in the LHWCA, 33 U.S.C. Section 903(a). He noted that, in the House and Senate reports corresponding to the amendments, Congress recognized the inadequacies of various state compensation schemes and the fact that, "'with the advent of modern cargo-handling techniques, such as containerization,' more of the longshoreman's work is now performed on land than before." Parker, 75 F.3d at 937 (App.A. at XX) (quoting 1972 U.S.C.C.A.N. at 4707-08). He further stated that, in light of these circumstances, Congress, in enacting the amendments,

was concerned with the "'disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occur[red].'" Id. (App.A. at XIX) (quoting 1972 U.S.C.C.A.N. at 4707). In that regard, Judge Murnaghan observed the congressional intent to provide for a uniform system of LHWCA coverage for similarly situated workers across various physical locations.[7] In light of this intent, and in keeping with the judicial policy of broad interpretation of the LHWCA in order to carry out its remedial purposes and to avoid harsh and incongruous results, as enunciated in Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 268 (1977), Judge Murnaghan determined that the court's restrictive application of the situs requirement was and is improper. Parker, 75 F.3d at 938 (App.A. at XX-XXI).

Judge Murnaghan next cited to the two prior Fourth Circuit cases outlined above, Graham, 573 F.2d 167, and Humphries, 834 F.2d 372, and the cases addressing situs out of the Fifth and Ninth Circuits, Texports, 632 F.2d 504, and Brady-Hamilton, 568 F.2d 137, respectively, which, in his view, mandate the application of a fact-intensive "functional" approach to the situs requirement under the LHWCA.[8] Parker, 75

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[7] In this respect, Judge Murnaghan stated that "Congress believed that the amount of compensation received by an injured employee 'should not depend on the fortuitous circumstance of whether the injury occurred on land or over water.'" Id. (App.A. at XX) (quoting 1972 U.S.C.C.A.N. at 4708).

[8] Note that, while Judge Murnaghan did not specify which of the various functional approaches utilized across the circuits was preferable, he did indicate that prior Fourth Circuit precedent established that, while not dispositive, the Brady-Hamilton four-factor

F.3d at 938-39 (App.A. at XXI-XXIV). In that regard, he noted (1) that "this and other circuits have suggested that what the statute requires when it states that the injury must have occurred on either navigable waters or an 'adjoining area,' 33 U.S.C. [Section] 903(a), is a strong functional relationship between such waters and the site of the injury," Parker, 75 F.3d at 938 (App.A. at XXII), and (2) that the court's decisions in both Sidwell and in the case at bar "run[] directly contrary to such rulings . . . ." Parker, 75 F.3d at 939 (App.A. at XXIII).

Finally, even aside from his determination that the Fourth Circuit's approach runs contrary to the policies embodied in the Act and his concern with the conflict the Sidwell test creates with other circuits and with prior Fourth Circuit precedent, Judge Murnaghan pointed to the specific language utilized in the Act as amended. He noted that "adjoining" means "touching or bounding" or being "near in space." Parker, 75 F.3d at 939 (App.A. at XXIV) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 27 (1981)). In light of this definition, he stated:

> Recognizing our duty to interpret the statute broadly so that Congress's remedial objectives may be achieved, . . . we should hold that the phrase 'other adjoining area' does not require that an area be contiguous with navigable waters for that area to be covered by the LHWCA. To hold otherwise not only violates our duty to accord the statute a broad interpretation, but also fundamentally conflicts with the

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test was a useful guidepost for the inquiry. Parker, 75 F.3d at 939 (App.A. at XXIV).

approach we took in Humphries.

Parker, 75 F.3d at 939 (App.A. at XXIV-XXV) (internal citation omitted). In essence, Judge Murnaghan concluded that an unduly restrictive interpretation of the situs requirement such as the one adopted by the Fourth Circuit in Sidwell and Parker will ultimately subject claimants to the very "harsh" and "incongruous" results which prompted Congress to amend the situs requirement in the first place. Parker, 75 F.3d at 940 (App.A. at XXVI) (citing Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 268 (1977)).[9]

What Judge Murnaghan's concurring opinion ultimately demonstrates is that the Fourth Circuit, in both Sidwell and the instant case, interpreted and applied the situs requirement under the Act in a fashion which not only conflicts directly with the legislative policies embodied in that Section and with all prior precedent which has directly addressed the scope of the situs requirement, but further conflicts with all prior decisions within the Fourth Circuit itself which have addressed that issue. Admittedly, those cases do not specifically set forth an explicit test to be applied in determining situs. However, in light of the factual contexts in which they

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[9] Refer as well to the concurring opinion of Judge Beaty in Sidwell. 71 F.3d 1134, 1142. Judge Beaty's position essentially mirrors the sentiments pronounced by Judge Murnaghan. Specifically, as Judge Murnaghan did in this case, Judge Beaty disagreed with the delineation of a restrictive situs test which limits coverage under the Act to areas which actually touch the navigable waterways. 71 F.3d at 1143. Further, Judge Beaty stated that a functional approach such as that utilized in Brady-Hamilton could provide an appropriate and uniform framework for the situs inquiry without being unduly restrictive in the fashion chosen by the majority. Id.

arose, they clearly foreclosed a subsequent determination that the LHWCA's jurisdiction is limited to facilities which actually touch the navigable waters of the United States. Given the determination to the contrary in both Sidwell and the present case, an indisputable disparity exists within the Fourth Circuit. In the face of such a split of authority within the very circuit which pronounced and applied the restrictive test at issue in this case, both in case law and judicial opinion, the need for binding interpretation by this Court is unmistakable.

III. ***The decision of the Court of Appeals in this case involves the important federal question of what constitutes a covered situs under the Longshore Act, which has not been, but should be, decided by this Court.***

The Court has in past years addressed issues which relate in part to the situs issue presented in this case. For example, in Director, OWCP v. Perini North River Assocs., 459 U.S. 297, 324 n.32 (1983), the Court held that the requirements of "status" and "situs" are distinct. In addition, the Court held in Herb's Welding, Inc. v. Gray, 470 U.S. 414, 426 (1985), that neither requirement should be read to render the other superfluous. Finally, in Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977), the Court confronted the issues of whether two claimants met the jurisdictional status and situs requirements under the Longshore Act. In addressing these concepts, the Court initially noted that the LHWCA should be liberally construed in conformance with its remedial purposes and in a way which avoids harsh and incongruous results. Id. at 268. The Court then entertained a detailed discussion of the status

requirement under the Act. However, with respect to situs, the Court merely held that the locus of the claimants' injuries met the situs requirement as the facilities on which the injuries occurred were immediately adjacent to and physically touched navigable waterways. Id. at 279-81. However, the Court in no way addressed the issue of whether or not additional areas further removed from such a waterway would meet the situs requirement.[10]

Thus, the Court has never specifically addressed what test or factors should be utilized in determining whether the location of an individual's injury meets the situs requirement under the LHWCA. More definitively, the Court has never given any guidance as to what constitutes an "adjoining area" within the intent and scope of Section 903(a) of the Act. As a result, there is currently disparity in coverage under the Act because of the differing tests and factors outlined above.

There can be no doubt that, where a federal act such as the LHWCA evinces a clear legislative intent to provide for uniformity in application, and where the application that actually results across the various federal circuits is anything but uniform, the lack of uniformity must be remedied. As this case presents the particular issue upon which the divergence outlined above is predicated, this case affords the Court the attractive opportunity to bring clarity to the law under the LHWCA and guidance to those who serve to uphold the tenants of that Act.

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[10] See supra n.4.

IV. *The decision of the Court of Appeals in this case is erroneous and is likely, given the significant volume of longshoring, shipbuilding, and commercial shipping activity which occurs within the Fourth Circuit, to have broad detrimental effects which will undermine the very purposes of the Longshore Act.*

In his concurring opinion, Judge Murnaghan determined that the restrictive test adopted in Sidwell and applied in the immediate case is in direct contravention of the letter and spirit of both the Act and all pertinent precedent thereunder. In light of this conclusion, he stated that the Court of Appeals should have applied a functional approach and, under such an inquiry, should have concluded that the injuries suffered by Petitioners herein at the 24th Street facility occurred on a covered situs under the LHWCA. In reaching this conclusion, Judge Murnaghan focused on (1) the fact that Respondent Farrell was forced, due to terminal expansion initiated by the Virginia Port Authority, an agency of the Commonwealth of Virginia, to move the majority of its container-repair operations to the 24th Street facility; (2) the fact that the 24th Street facility is as close to the terminal as possible; (3) the fact that, on a daily basis, maritime workers are shuttled between the terminal and the off-terminal facility under the direction of a single supervisor; and (4) the fact that the 24th Street site was chosen, at least in part, due both to the ease with which such routine shuttling of personnel could be conducted and to the prior use of the site as a container-repair facility. Parker, 75 F.3d at 939-40, 941 (App.A. at XXV-XXVI). Under those facts, Judge Murnaghan concluded that the site at which Petitioners were injured maintained an undeniable functional relationship to the navigable

waters of the United States, thereby entitling Petitioners to benefits under the Act. To hold otherwise, in his view, ignores the language of the Act, properly construed; its underlying policies; and all pertinent precedent under the Act to date.[11]

The significance of Judge Murnaghan's admonitions cannot be overstated in light of the impact the court's decision in this case will have on a large portion of the future cases brought under the LHWCA, as the court's situs test is now controlling on all future LHWCA cases brought in the Fourth Circuit.

The Fourth Circuit encompasses Maryland, Virginia, West Virginia, North Carolina, and South Carolina. Of primary note within that geographic area is the Hampton Roads region in southeastern Virginia. This area includes Newport News Shipbuilding and Dry Dock Co., one of the nation's largest shipbuilding and ship repair facilities for both private and United States Navy

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[11] In this respect, Judge Murnaghan concluded that:

> By adopting a cramped interpretation of the phrase "other adjoining area" and thereby denying Petitioners' claims on jurisdictional grounds, we are subjecting Petitioners to a "harsh and incongruous result[]," . . . , that is of the precise nature that offended Congress's sensibilities and motivated it to amend the Act: Petitioners are entitled only to state benefits, even though they would have been eligible for additional benefits under the LHWCA if their injuries had occurred during one of the frequent shifts at the terminal, rather than during a shift at the nearby off-terminal facility to which the Commonwealth's actions forced their employer to move.

Parker, 75 F.3d at 940 (App.A. at XXVI-XXVII) (internal citation omitted).

vessels. The facility physically covers approximately 550 acres and contains the largest dry dock in the Western Hemisphere. The Port of Greater Hampton Roads Annual 1995, at 113-14 (1995). In addition, the facility currently employs nearly 20,000 employees involved in various facets of the shipbuilding and ship repair processes. Id. at 119. The shipyard itself has expanded over the course of the past several decades to the point that portions of the yard are separated by public streets not controlled or owned by the shipyard. Likewise, shipbuilding and ship-repair tasks often take place in areas not in direct contact with the property boundaries of the shipyard. The reason for this separation is again economic expansion of the shipbuilding and repair enterprises and the scarcity of waterfront land upon which such activities can be performed. At the same time, the various functions performed on these off-waterfront sites are integral to the shipbuilding and ship repair activities which are the essence of the shipyard's business.

In addition to Newport News Shipbuilding, the Hampton Roads area is the location of numerous additional shipbuilding, ship repair, longshoring, and commercial cargo enterprises. Specifically, the area serves as the location for thirteen large shipbuilding and ship repair facilities; six international marine container terminals; seven merchandise terminals; three coal terminals; one grain handling facility; and fifteen oil storage and handling facilities. Id. at 34-60.

Indeed, statistics show that, in 1993, more foreign water-borne commerce was exported through Hampton Roads than any other city on the East Coast. Id. at 5. Likewise, Hampton Roads ranked third in this category overall in the entire United States. Id. Further, in 1993,

Hampton Roads handled over 53 million short tons of cargo and received over 2,500 vessel calls from vessels representing more than 80% of the world's leading shipping lines. Id. Finally, Hampton Roads is the largest coal port in the world. Id. at 124.

What the above facts demonstrate is that the propriety of the Court of Appeals decision limiting coverage under the Longshore Act through its restrictive application of the situs test is of particular importance because of the substantial maritime activity which occurs in the Fourth Circuit geographic area. Clearly, where the propriety of that decision is questionable in light of the divergent interpretations and applications of the situs requirement in other jurisdictions and within the Fourth Circuit itself, the need for a proper and appropriate resolution of the issue by this Court is indisputable.

CONCLUSION

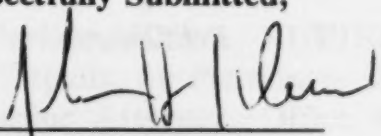
In the immediate case, the Fourth Circuit Court of Appeals applied a hard and fast rule which limits coverage under the LHWCA to individuals who are injured on property which physically touches the navigable waters of the United States. This limitation is in contravention of significant precedent from three other federal circuits, and from the Fourth Circuit itself, which mandates various "functional" approaches to the situs inquiry under the LHWCA. The limitation also conflicts with the letter and spirit of the situs provision and with the judicial policy of broad interpretation of the situs requirement under the Act. In addition, when applied, the test is likely to significantly limit coverage under the Act and to perpetuate disparate treatment of similarly-situated, similarly-employed maritime workers depending

upon the physical location of their injuries.

In light of these notable disparities, and in the face of the policy of uniform application embodied in the LHWCA, Petitioners submit that this Court should exercise its power of discretionary review and provide for uniformity of coverage in keeping with the purposes of the LHWCA.

Finally, Petitioners again request that the immediate Petition be consolidated with the Petition filed with this Court in Sidwell v. Express Container Services, Inc., No. 95-1569, for purposes of consideration by the Court, as the issue presented by both cases is identical.

Respectfully Submitted,



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APPENDIX A

Decision of the United States Court of Appeals for the Fourth Circuit: Parker; Redmon v. Director, OWCP, 75 F.3d 929 (4th Cir. February 9, 1996) (No. 94-2653).

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EARL J. PARKER, JR.;
GLENN C. REDMON,

Petitioners,

v. **No. 94-2653**

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; FARRELL LINES, INC.; ROYAL INSURANCE CO.,

Respondents.

On Petition for Review of an Order of the Benefits Review Board. (92-982-BLA, 92-983-BLA)

Argued: September 25, 1995
Decided: February 9, 1996

Before POWELL, Associate Justice (Retired),[1] United States Supreme Court, sitting by designation, and MURNAGHAN and Williams, Circuit Judges.

Denied by published opinion. Judge WILLIAMS announced the judgment of the court and wrote an opinion, in which Judge MURNAGHAN joined as to Part IV. Judge MURNAGHAN wrote a concurring opinion.

COUNSEL

ARGUED: John Harlow Klein, RUTTER & MONTAGNA, Norfolk, Virginia, for Petitioners. Joshua Thomas Gillelan, II, Senior Attorney, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Gerard E. W. Voyer, TAYLOR & WALKER, P.C., Norfolk, Virginia, for Respondents. ON BRIEF: Thomas S. Williamson, Jr., Solicitor of Labor, Carol A. De Deo, Associate Solicitor, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondent Director. Donna White Kearney, TAYLOR & WALKER, P.C., Norfolk, Virginia, for Respondents Farrell Lines and Royal Insurance.

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[1] Justice Powell heard oral arguments but did not participate in the decision. The decision is filed by quorum of the panel. 28 U.S.C. [Section] 46(d).

OPINION

WILLIAMS, Circuit Judge:

As a quorum, we must decide whether a container-repair facility that neither is contiguous with navigable waters nor touches such waters, and that is not within the boundary of a shipping terminal, is a maritime situs under the Longshore and Harbor Workers' Compensation Act (the LHWCA), 33 U.S.C.A. [Sections] 901-950 (West 1986). Petitioners Earl J. Parker, Jr. and Glenn C. Redmon were injured in separate accidents during the course of their employment as, respectively, an inspector and a container mechanic for respondent Farrell Lines, Inc.[1] Petitioners challenge a decision of the Benefits Review Board (the Board) affirming the decision of an administrative law judge (ALJ) denying their claims for compensation on the basis that their injuries did not occur on a maritime situs. See 33 U.S.C.A. [Section] 903(a) (West 1986). Because we conclude that the off-terminal facility where Petitioners were injured is not a maritime situs, as another panel has defined that term in *Sidwell v. Express Container Services, Inc.*, No. 95-1101, _____ F.3d _____ [71 F.3d 1134] (4th Cir. Dec. 28, 1995), we deny the petition for review. In addition, we take this opportunity to clarify the role of the Director of the Office of Workers' Compensation Programs (the Director) in review proceedings under the LHWCA.

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[1] Royal Insurance Company, Farrell's insurer, is also named as a respondent in the petition for review. For ease of reference, we refer to both as "Farrell."

I.

Farrell owns ships that transport containerized cargo[2] to and from various ports, including the Norfolk International Terminal (NIT) in Norfolk, Virginia. Farrell also owns containers into which cargo is packed before shipping. Farrell periodically inspects its containers and makes necessary repairs as a part of its shipping operations.

Farrell leases a small inspection and repair facility at NIT, but performs most of its container-repair work at a larger facility located at 901 West 24th Street in Norfolk (the 24th Street site), approximately five miles from NIT. Although Farrell originally conducted all of its container-repair operations at NIT, expansion of the terminal compelled Farrell to transfer most of these operations off-terminal. Farrell employees engage in the same activities at the 24th Street site as at NIT. One Farrell employee is permanently assigned to the NIT facility; others are transferred to and from the NIT facility on an as-needed basis. In addition to servicing containers from NIT, the 24th Street site receives containers, chassis, and refrigeration units that arrive overland by truck and by rail.

The 24th Street site is located in an area of Norfolk zoned for light industrial uses and is surrounded by a residential area to the north, a railway to the south, and various small businesses in the immediate vicinity. Farrell

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[2] The term "containerized cargo" refers to cargo that has been loaded into mobile storage units -- containers -- for the purpose of transporting the cargo to its destination.

selected the 24th Street site for a variety of reasons including proximity to NIT, the ease with which containers and employees could be moved between NIT and the 24th Street site, suitability of the site for container repair, and favorable lease terms. Farrell considered and rejected several other sites because of their greater distance from NIT and their unsuitability to Farrell's purposes.

Petitioners were injured in separate instances at the 24th Street facility[3] and received compensation under the Virginia Workers' Compensation Act. Each petitioner filed a separate claim under the LHWCA, seeking the greater benefits it affords. The administrative law judge (ALJ) consolidated the actions and denied benefits, basing the denial on his determination that the 24th Street site was not a maritime situs covered by the LHWCA. The Board affirmed, and Petitioners now seek review of the ALJ's decision. Whether a particular site is a maritime situs under the LHWCA is a mixed question of law and fact subject to plenary review. *See Humphries v. Director, OWCP*, 834 F.2d 372, 374 (4th Cir.1987), *cert. denied*, 485 U.S. 1028 (1988).

II.

In order to qualify for benefits under the LHWCA, a claimant must establish that, at the time of the injury,

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[3] Because the parties have stipulated that Petitioners were engaged in maritime employment at the time of their injuries, *see* 33 U.S.C.A. [Sections] 902(3), 903(a) (West 1986), discussion of the circumstances surrounding Petitioners' injuries is unnecessary.

he was engaged in maritime employment (the "status" test), *see* 33 U.S.C.A. [Sections] 902(3), 903(a) (West 1986), and that he was injured "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)," 33 U.S.C.A. [Section] 903(a) (the "situs" test). The status and situs tests were created as part of the 1972 amendments to the LHWCA, the purpose of which was to expand coverage to include workers who travelled from ship to shore as they worked, thereby preventing such workers from walking in and out of coverage during the course of the day. *See Humphries*, 834 F.2d at 373.

Petitioners contend that the ALJ erred in concluding that the 24th Street site is not a maritime situs under the LHWCA. According to Petitioners, the 24th Street site properly is considered an "other adjoining area" of NIT, at least in part because Farrell was forced by expansion of NIT to move its container-repair operations to the 24th Street site, the closest available site to the terminal. Petitioners claim that extending the reach of the LHWCA to the 24th Street site, five miles from NIT, is necessary to avoid the sort of sporadic coverage that the 1972 amendments to the LHWCA were designed to eliminate.

Our analysis of the question of whether the 24 Street site is a maritime situs under the LHWCA is controlled by the recent decision of this court in *Sidwell v. Express Container Services, Inc.*, _____ F.3d _____ [71 F.3d 1134] (4th Cir. 1995). In *Sidwell*, we explicitly rejected tests based on interpretations of the phrase

"other adjoining area" offered by the Third, Fifth, and Ninth Circuits on the ground that each test "openly disavow[ed] the statutory text." *Id.*, slip op. at 9 [71 F.3d at 1138]. Instead, based on the ordinary meaning of the term "adjoin," we held that "an area is 'adjoining' navigable waters only if it 'adjoins' navigable waters, that is, if it is 'contiguous with' or otherwise 'touches' such waters." *Id.*, slip op. at 11-12 [71 F.3d at 1138-39]. Additionally, we noted that the situs test may be satisfied if the injury occurs within the boundaries of a marine terminal that is contiguous with navigable waters. *Id.*, slip op. at 15 n.11 [71 F.3d at 1140 n.11].

Applying the principles of *Sidwell* to the facts before us, we conclude that Petitioners have not established that they were injured on a maritime situs. Under *Sidwell*'s cogent explanation of the statutory language, the dispositive question of whether the 24th Street site is a maritime situs involves a straightforward geographical determination: either the 24th Street site adjoins navigable waters and is a maritime situs, or it does not and is not. Because the 24th Street site neither is contiguous with navigable waters, nor touches such waters, nor is located within the boundaries of NIT, it cannot be a maritime situs under the LHWCA. That Farrell was compelled to relocate to the 24th Street site by expansion of NIT does not affect our decision, nor does it matter that some Farrell employees occasionally travel between NIT and the 24th Street site. As we explained in *Sidwell*, the relevant inquiry is whether the situs upon which the injury occurred is a maritime situs:

> [Claimant] argues that whether terminal expansion has forced relocation

> **from a site directly adjoining navigable waters to one that does not adjoin such waters (but is the closest feasible), is relevant to whether a particular site adjoins navigable waters. We disagree. The exigency of even a forced relocation cannot transform a site distant from navigable waters into one that somehow "adjoins" those waters. The site either adjoins navigable waters or it does not, and, as the Supreme Court has instructed, that is a geographical inquiry.**
>
> **The same must be said with respect to the fact that [the employer] had mobile trucks which went to the terminal to perform minor repairs on-site. That an employer sends some workers to the waterfront -- or even that an employer has a separate site altogether that is "adjoining" navigable waters -- is not germane to the question of whether an injury occurred at a covered situs. The statute is expressly limited to the place where the "injury occurr[ed]"; an employer's other activities or locations are irrelevant to the geographic inquiry of whether the injury occurred at a covered situs.**

***Id.*, slip op. at 12 n.8 [71 F.3d at 1139 n.8]. Accordingly, we deny the petition for review.**

III.

I cannot share Judge Murnaghan's view that *Sidwell* is wrongly decided because that decision employs too narrow a construction of the term "adjoining." In my view, *Sidwell* correctly rested on the plain language of the statute. *See Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993) (noting that plain statutory language is conclusive in the absence of a clearly expressed legislative intent to the contrary). Judge Murnaghan's reliance on policy grounds to expand the situs test beyond that contemplated by the plain language of the statute is particularly inappropriate in light of the Supreme Court's clear admonition that we not substitute our own policy preferences for those of Congress. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483-84 (1992). Moreover, the policy on which Judge Murnaghan relies -- that of favoring coverage over non-coverage, *post* at 940 -- proves too much: it is precisely the policy that *Sea-Land Service, Inc. v. Director, OWCP*, 540 F.2d 629, 636-38 (3d Cir. 1976), wielded to eliminate the situs requirement altogether, a result directly contrary to the statute and expressly disapproved by the Supreme Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426-27 (1985); *see also Humphries*, 834 F.2d at 372 (disapproving of Third Circuit's reasoning in *Sea-Land Service*). As *Sidwell* explains, slip op. at 13-14 [71 F.3d at 1140], in enacting the 1972 amendments to the LHWCA Congress was motivated by the much more narrow policy of providing uniform coverage on both sides of the gangplank, the water and the *adjoining* land. Finally, I cannot agree with Judge Murnaghan that we owe deference to the Director's amorphous interpretation of the situs requirement. As *Sidwell* held, that interpretation

-- under which locations as remote as Kansas City, Kansas would be covered situses -- conflicts with the plain statutory language and hence is due no deference. *See id.*, slip op. at 15-16 [71 F.3d at 1142].

IV.

We take this opportunity to address the Director's proper role in petitions for review under the LHWCA. The LHWCA provides in pertinent part that "[a]ny person adversely affected or aggrieved by a final order of the Board may obtain review of that order in the United States court of appeals for the circuit in which the injury occurred." 33 U.S.C.A. [Section] 921(c) (West 1986). While the Director was a party to all petitions for review prior to the 1972 amendments to the LHWCA, Congress did not designate the Director as a party to petitions for review in the 1972 amendments. *See I.T.O. Corp. v. Benefits Review Bd.*, 542 F.2d 903, 906 (4th Cir. 1976) (en banc) (*I.T.O. Corp. I*), *vacated and remanded on other grounds sub nom. Adkins v. I.T.O. Corp.*, 433 U.S. 904 (1977).[4] In *I.T.O. Corp. I*, we held that Congress' failure to designate the Director as a party meant that "if the Director is to be a party, [s]he must be a 'person adversely affected or aggrieved by a final order of the Board' within the meaning of [Section] 912(c)." *Id.* at 907. Based on this reasoning, we concluded that the Director is not a proper respondent in a petition for review under the LHWCA unless she can show that she

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[4] On remand, the en banc court adhered to its holding that the Director is not a proper respondent in a petition for review under the LHWCA. *See I.T.O. Corp. v. Benefits Review Bd.*, 563 F.2d 646, 648 (4th Cir. 1977) (en banc) (per curiam) (*I.T.O. Corp. II*).

is a person adversely affected or aggrieved by the decision of the Board.[5] *Id.* at 909.

The holding of *I.T.O. Corp. I* should have ended the practice of automatically naming the Director as a respondent in all petitions for review under the LHWCA. The practice did not end, however, perhaps because *I.T.O. Corp. I* did not discuss the impact of Federal Rule of Appellate Procedure 15(a), which requires that "the agency must be named respondent" in a petition for review of an order of an administrative agency, board, commission, or officer. We agree with the District of Columbia Circuit that Rule 15(a) simply is not applicable in the context of a petition for review under the LHWCA because the Director's presence as a party is not necessary:

> **Normally, a single private party is contesting the action of an agency, which agency must appear and defend on the merits to insure the proper adversarial clash requisite to a "case or controversy." But Rule 1(b), Fed.R.App.P., says that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law." Here, there is sufficient adversity between [the**

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[5] **The Director is adversely affected or aggrieved if a decision by the Board directly hampers the Director's ability to carry out her statutory duties. *See Director, OWCP v. Newport News Shipbldg. & Dry Dock Co.*, 8 F.3d 175, 180-81 (4th Cir. 1993), *aff'd*, 115 S. Ct. 1278 (1995). The Director's mere disagreement with the decision of the Board does not render her adversely affected or aggrieved. *See I.T.O. Corp. I*, 542 F.2d at 907-09.**

> employer and the claimant] to insure proper litigation without participation by the Board. To require the Board to appear as a party would parallel requiring the District Court to appear and defend its decision upon direct appeal.

McCord v. Benefits Review Bd., 514 F.2d 198, 200 (D.C.Cir. 1975); *see also Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 485 (D.C.Cir. 1982) ("The reasoning of *McCord* -- that the rationale of Rule 15(a) is inapplicable to this kind of situation -- applies as much to the [Director] as it does to the Board."). *But see Ingalls Shipbldg. Div., Litton Sys., Inc. v. White*, 681 F.2d 275, 283 (5th Cir. 1982) (declining to follow *Shahady*), *overruled in part on other grounds by Newpark Shipbldg. & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir. 1984).

Therefore, we reaffirm the holding of *I.T.O. Corp. I* that the Director shall not automatically be named as a respondent in a petition for review under the LHWCA, but must make an affirmative showing that she is adversely affected or aggrieved by the decision of the Board.[6] If the Director is not adversely affected or aggrieved by the decision of the Board, but nonetheless wishes to participate on behalf of one of the parties, she first must request and be granted permission to intervene on the side of the party whose position she supports. *[S]ee I.T.O. Corp. I.*, 542 F.2d at 909 ("The Director unquestionably has a right to seek to intervene under Rule 24(b) Fed.R.Civ.P., and an application will ordinarily be

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[6] In addition, we note that this holding applies only to petitions for review under the LHWCA.

granted.") (footnote omitted). In accordance with this holding, we dismiss the Director as a respondent in this petition for review and grant the Director's motion to intervene *nunc pro tunc* on the side of Petitioners.[7]

V.

Because the 24th Street site is not contiguous with navigable waters, we conclude that it is not a maritime situs under the LHWCA. Accordingly, we deny the petition for review.

DENIED

MURNAGHAN, Circuit Judge, concurring:

A panel of three Fourth Circuit judges (or of two acting as a quorum) may not overrule a prior published panel opinion. *Norfolk & Western Ry. v. Director, OWCP*, 5 F.3d 777, 779 (4th Cir.1993) ("Even if we were so inclined, . . . a panel of this court may not overrule another panel's decision."). Though I do so with great reluctance, I must therefore regard as binding the opinion filed for publication in December 1995, in *Sidwell v. Express Container Services, Inc.*, No. 95-1101 [71 F.3d 1134] (4th Cir. Dec. 28, 1995). I say "with great reluctance" because *Sidwell*, in addition to creating a circuit conflict with the Fifth Circuit's decision in *Texports*

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[7] We have considered the Director's position with respect to the proper interpretation of the phrase "other adjoining area," and reject that position for the reasons stated in *Sidwell*. *See Sidwell*, slip op. at 18-20 [71 F.3d at 1143].

Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir.1980), *cert. denied*, 452 U.S. 905 (1981), narrowly interprets the word "adjoining," as it appears in the phrase "other adjoining area" in the Longshore and Harbor Workers' Compensation Act (LHWCA), to mean only "adjacent" or "contiguous with."[1] *See* slip op. at 10 [71 F.3d at 1138]. The Oxford English Dictionary, however, defines "adjoining" not solely as "adjacent," but also as "neighbouring." It further defines "neighbouring" as "lying or living near." The word "neighboring" is by no means so circumscribed or limiting as "adjacent" or "contiguous with." If it were, the frequently used phrase "next-door neighbor" would be unnecessarily repetitive. Not surprisingly, therefore, one judge who concurred in *Sidwell* objected to the majority's "more literal interpretation" of the statutory language.

As I endeavor to make clear in the paragraphs that follow, I believe that *Sidwell*'s interpretation of the LHWCA's phrase "other adjoining area" is entirely at odds with the meaning that Congress intended us to ascribe to it. I also am persuaded that, in the instant case, Petitioners' injuries were sustained at an "adjoining area," properly construed.

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[1] In reaching that conclusion, the *Sidwell* majority relies upon introductory comments in a Senate committee report not appearing in the corresponding House report as proof of the full Congress's intent. *See infra* note 6.

I.

Petitioners' employer, Farrell Lines, Inc., owns and operates ships that transport container cargo to and from numerous ports, including the Commonwealth of Virginia's Norfolk International Terminal (NIT). Until 1980, Farrell conducted all Norfolk-area repairs of its containers at a situs located at NIT. In that year, however, in order to make room for a parking lot, the Commonwealth terminated Farrell's lease of a portion of the NIT property. Farrell therefore was forced to relocate most of its repair operations to a five-bay garage located on 24th Street in Norfolk, approximately five miles from the terminal and one mile from navigable water. Farrell selected that site because the building into which the company moved had formerly been used by another container-repair outfit and so was already in many ways suited to that task, because the location was convenient for rotating personnel between it and NIT, because available facilities closer to NIT were located in areas zoned to exclude such repair activity, and because the facility was available for a reasonable cost. The 24th Street site shares its neighborhood with other repair facilities, a shopping center, private residences, and a few professional offices. The change in location was in no way brought about by Petitioners.

While at least one container repairman is permanently stationed at NIT, repairmen from the 24th Street location are called to NIT -- usually on a daily basis -- to deliver parts, to conduct repairs, and to make inspections. A single manager is responsible for repair activity at both sites and coordinates the routine transport of personnel between them.

Petitioners, Earl J. Parker, Jr., and Glenn C. Redmon, performed inspection and repair functions for Farrell Lines; both were injured while working at the 24th Street site.[2] Both men received state workers' compensation benefits, but sought the additional benefits available under the LHWCA. Respondents -- Farrell Lines and its insurer, Royal Insurance Company -- resisted. While agreeing that Petitioners were maritime employees carrying out maritime tasks within the meaning of the LHWCA, Respondents contended that the injuries had not occurred at a maritime situs, as defined and required by the Act.

In an order issued on December 30, 1991, the Administrative Law Judge denied Petitioners' claims for federal benefits, focusing solely on the jurisdictional situs issue. He relied heavily upon the Ninth Circuit's decision in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978), finding that three of the four factors considered by that court to determine whether an injury occurred at a LHWCA-covered maritime situs had not been met: he concluded that the 24th Street site was not particularly suitable for maritime uses, that adjoining properties were not primarily devoted to maritime uses, and that the site was not close to a waterway.[3]

Petitioners appealed. On October 26, 1994, the

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[2] Redmon fell and injured his left wrist and Parker cut his left leg with a saw.

[3] The ALJ did find, though, that the fourth *Brady-Hamilton* factor had been met: the site was as close to the waterway as was feasible.

Benefits Review Board affirmed the ALJ's decision, finding that the record contained substantial evidence to support the ALJ's determination that the injuries had not occurred at a covered situs. The Board approved of the ALJ's reliance upon *Brady-Hamilton*, citing a Fourth Circuit opinion, *Humphries v. Director, OWCP*, 834 F.2d 372 (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988), in which we described *Brady-Hamilton* as taking a "more practical approach" to the situs issue than that taken by two other circuits, and noting the Fourth Circuit's affirmance (albeit in an unpublished opinion, *Davis v. Doran Co. of California*, 865 F.2d 1257 (4th Cir. 1989), *aff'g* 20 B.R.B.S. 121 (1987)) of a Board decision founded upon the *Brady-Hamilton* factors. Petitioners subsequently filed for review of the Board's decision.

On March 20, 1995, the Director of the Labor Department's Office of Workers' Compensation Programs (OWCP) filed a brief arguing in favor of reversal of the Board's decision. The Director made two contentions: first, that *Brady-Hamilton* does not provide an exhaustive list of factors to be considered when making situs determinations under the LHWCA,[4] and second, that the OWCP's long-standing interpretation of the situs requirement favors Petitioners' position and deserves deference by us.

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[4] The Director argued that the ALJ and Board wrongly ignored the broad purposes underlying the 1972 Amendments to the LHWCA when they asked whether Petitioners or Respondents had a greater claim to a majority of the *Brady-Hamilton* factors, rather than look at the overall functional relationship between the NIT and 24th Street facilities.

Though a court must defer to the ALJ's factual findings so long as they are supported by substantial evidence, *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988), the issue of maritime situs under the LHWCA, "while imbued with 'factual' qualities, is essentially a mixed question of law and fact which we . . . can review for errors of law," *Humphries*, 834 F.2d at 374.

II.

A.

The LHWCA provides death and disability benefits to individuals who meet the Act's definition of "employee."[5] Such benefits are to be paid, however, only "if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. [Section] 903(a).

Section 903(a)'s parenthetical language was added by Congress in 1972. Pub. L. No. 92-576, [Section] 2(c), 86 Stat. 1251 (Oct. 27, 1972), *reprinted in* 1972

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[5] The Act defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . ." 33 U.S.C. [Section] 902(3). Respondents stipulated that Petitioners were employees within the meaning of the Act.

U.S.C.C.A.N. 1452, 1452-53. The Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor identified several reasons for so amending the Act. See S.Rep. No. 92-1125, 92nd Cong., 2nd Sess. 12-13 (1972); H.R.Rep. No. 92-1141, 92nd Cong., 2nd Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4707-08.[6] First, prior coverage "stop[ped] at the water's edge"; injuries occurring on land were covered only by states' workers' compensation programs. Consequently, there existed "a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occur[red]."[7] 1972 U.S.C.C.A N. at

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[6] The House and Senate reports are identical in nearly all pertinent respects. Because only the House report was published in *U.S. Code Congressional and Administrative News*, all references are made to that publication.

The House and Senate reports are different, however, in one respect. The Senate report states, in its introductory comments, that the Amendments expand the Act's coverage to "injuries occurring in the contiguous dock area related to longshore and ship repair work." *See* S.Rep. No. 92-1125, at 2. The *Sidwell* majority seizes upon this statement as conclusive evidence of the full Congress's intent. *See Sidwell*, slip op. at 9 [71 F.3d at 1138]. The House report, however -- though otherwise identical to the Senate report in its discussion of section 903(a)'s parenthetical language -- contains no such statement. Moreover, there is no question that the Amendments extended coverage to "the contiguous dock area": the question is whether coverage was extended to non-contiguous areas as well.

[7] The present case presents the analogous situation where one seeks and obtains employment at which he will clearly be entitled to LHWCA benefits in case of injury, only to lose his entitlement to those potentially important benefits when by no action on his part his employer is forced to move the situs where he frequently works to

4707. Second, states' workers' compensation laws often provided inadequate benefits. *Id.* Third, Congress recognized that, "with the advent of modern cargo-handling techniques, such as containerization," more of the longshoreman's work is now performed on land than before. 1972 U.S.C.C.A.N. at 4707-08. In sum, Congress believed that the amount of compensation received by an injured employee "should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." 1972 U.S.C.C.A.N. at 4708.

The Supreme Court has acknowledged Congress's desire to remedy the fact that many workers, during the course of the work day, passed in and out of LHWCA coverage prior to the 1972 Amendments. *See, e.g., P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 75 (1979); *see also Humphries*, 834 F.2d at 373 (making the same observation). As remedial legislation, the Act, as amended, must be "'liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'" *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977) (quoting *Voris v. Eikel*, 346 U.S. 328, 333 (1953)).

Farrell Lines's 24th Street facility is not, standing alone, necessarily an "adjoining pier, wharf, dry dock, terminal, building way, [or] marine railway." *See* 33 U.S.C. [Section] 903(a). Yet if we were to bear in mind our duty to interpret the statute broadly and in keeping with Congress's remedial purposes, we would surely conclude that Farrell Lines's 24th Street facility is a

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another location, albeit as close to navigable waters as is feasible.

maritime situs within the meaning of section 903(a)'s reference to "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."

B.

In an opinion issued in 1987, we concluded, after reviewing the issue of situs under the LHWCA, that "[t]here is . . . no single convincing test for determining just where the geographical boundaries of coverage under the LHWCA lie" and that the inquiry requires a "difficult exercise in line drawing." *Humphries*, 834 F.2d at 373-74. Though twenty-three Fifth Circuit judges had "struggled bravely with the issue," we observed that a majority of that court was able to devise "little more than a litany of factors which are not conclusive in a situs determination." *Id.*; *see Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). We stated that, in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978), the Ninth Circuit had taken "what at first glance at least seems a more practical approach," *Humphries*, 834 F.2d at 374, by identifying four primary (yet non-exclusive) factors to be weighed:

> the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Brady-Hamilton, 568 F.2d at 141. We declined, however, formally to adopt the *Brady-Hamilton* approach or "to offer a touchstone for all future LHWCA jurisdictional questions." *Humphries*, 834 F.2d at 375. We simply stated that a situs "need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime' operation" for it to be within the LHWCA's scope. *Id.* at 373. We then held that the Board had properly ruled that the given employee's injuries, sustained when the employee was struck by a car while picking up food for employees working overtime, had not occurred at a covered situs: the accident occurred more than a mile from the terminal, it occurred on a public highway that did not connect any portions of the employer's operations, it happened after the employee had patronized a restaurant that was separated from water and the terminal by a residential neighborhood, at least one other restaurant was closer to the terminal, and the employee's location at the time of the injury "did not result from hazards uniquely inherent in the shipyard industry." *Id.* at 375 (quotation omitted). While acknowledging our duty to read the situs requirement broadly, we believed that to find coverage on such facts would be to come "perilously close to eliminating [the situs requirement] entirely." *Id.* at 375.

Even though in *Humphries* we did not adopt a particular test for making situs determinations, this and other circuits have suggested that what the statute requires when it states that the injury must have occurred on either navigable waters or an "adjoining area," *see* 33 U.S.C. [Section] 903(a), is a strong functional relationship between such waters and the site of the injury. In

Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167, 169 (4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1978), for example, we held that a parts-making facility and a foundry were covered situses because they were "integral parts of the shipyard," even though they were located 1,200 feet and 3,000 feet from the water's edge, respectively. *See also Brady-Hamilton*, 568 F.2d at 141 (stating that, to further Congress's remedial purposes, "the [statutory] phrase 'adjoining area' should be read to describe a functional relationship that does not in all cases depend upon physical contiguity").

Employing an approach focusing less on contiguity and more on functional relationships, at least two of our sister circuits have found non-contiguous areas to be maritime situses under the Act. In *Texports Stevedore*, for example, the Fifth Circuit held that a gear room located "five blocks from the gate of the nearest dock" and half of a block from the edge of Port Authority property was a covered situs. 632 F.2d at 507, 513-16. In *Brady-Hamilton*, the Ninth Circuit held that a gear locker "located approximately 2,600 feet north of the edge of the Columbia River and 2,050 feet outside the entrance gate of the Port of Longview" was a covered situs. 568 F.2d at 139-41. Our interpretation of the Act in *Sidwell* runs directly contrary to such rulings; indeed, the *Sidwell* opinion, while describing the approach taken in *Brady-Hamilton*, does not discuss the fact that a noncontiguous area was deemed covered in that case.

As in *Humphries*, we should again refuse to adopt a rigid definition of the statutory phrase "other adjoining area" -- particularly one requiring that an area be contiguous with or adjacent to navigable waters -- and

reiterate that a situs "need not be . . . within any specified distance of navigable waters or a 'maritime' operation" for it to fall within the Act's scope. *See Humphries*, 834 F.2d at 373. We should also reassert that, while the factors articulated by the Ninth Circuit in *Brady-Hamilton* are useful guideposts for conducting the situs inquiry, they do not comprise an exhaustive list of relevant considerations.

C.

In light of the statutory language, the legislative policies animating that language, the interpretation of the Act articulated by the Director of the OWCP in a document issued in 1977, and the facts of the present case, we should conclude that the 24th Street facility at which Petitioners' injuries occurred is a covered maritime situs.

As I have already stated, the word "adjoining" encompasses not only a strict notion of contiguity, but also a more relaxed notion of two things being located within the general vicinity of each other. *See Webster's Third New International Dictionary* 27 (1981) (defining "adjoining" as "touching or bounding" or being "near in space"). Recognizing our duty to interpret the statute broadly so that Congress's remedial objectives may be achieved, *see Northeast Marine Terminal*, 432 U.S. at 268, we should hold that the phrase "other adjoining area" does not require that an area be contiguous with navigable waters for that area to be covered by the LHWCA. To hold otherwise not only violates our duty to accord the statute a broad interpretation, but also fundamentally conflicts with the approach we took in

Humphries. In that case, we did not narrowly ask whether the site at which the claimant was injured was contiguous with navigable waters. Instead, we took a fact-intensive approach, asking not only what the distance was between the situs and the water, but also whether the injury occurred on a road connecting the employer's operations, whether the site of the injury was separated from the water by non-maritime neighborhoods, whether the employee could have carried out his assigned task at a location closer to the terminal, and whether the employee's location at the time of the injury was attributable to "hazards uniquely inherent in the shipyard industry." 834 F.2d at 375 (quotation omitted).

Employing a similarly fact-intensive analysis here, we should find that the off-terminal facility at which Petitioners sustained their injuries is sufficiently proximate to navigable waters to enable Petitioners to make claims for federal benefits. The 24th Street facility is located one mile from such waters. Farrell Lines was forced by the Commonwealth of Virginia to move most of its container-repair operations to the off-terminal site due to terminal expansion. The 24th Street facility is as close to the terminal as possible: at the time the facility was chosen, all closer facilities were located in areas zoned to exclude such operations. On a daily basis, workers are shuttled between the terminal and the off-terminal facility under the direction of a single supervisor in accordance with the company's repair needs; the 24th Street site was in fact chosen, at least in part, because of the ease with which such routine shuttling of personnel could be conducted. Petitioners' location at the time of their injuries was surely the result of "hazards uniquely inherent in the shipyard industry": due to shipyard

expansion, Petitioners had no choice but to carry out essential maritime work that had once been performed near the water's edge at the 24th Street facility instead. In short, a very strong functional relationship exists between the 24th Street facility and NIT. *See Graham*, 573 F.2d at 169; *Brady-Hamilton*, 568 F.2d at 141.

The policy considerations underlying the passage of the 1972 Amendments should further persuade us that the 24th Street facility is a covered situs. Congress made clear that it regarded state-provided benefits as inadequate. *See* 1972 U.S.C.C.A.N. at 4707. It also made clear that it was deeply troubled by the fact that many maritime workers frequently passed in and out of LHWCA coverage while carrying on their daily tasks, so that the amount of compensation they received depended on "the fortuitous circumstance" of where they happened to be working when the injury occurred. *See* 1972 U.S.C.C.A.N. at 4707-08. Coverage was therefore extended landward. By adopting a cramped interpretation of the phrase "other adjoining area" and thereby denying Petitioners' claims on jurisdictional grounds, we are subjecting Petitioners to a "harsh and incongruous result[]," *see Northeast Marine Terminal*, 432 U.S. at 268, that is of the precise nature that offended Congress's sensibilities and motivated it to amend the Act: Petitioners are entitled only to state benefits, even though they would have been eligible for additional benefits under the LHWCA if their injuries had occurred during one of the frequent shifts at the terminal, rather than during a shift at the nearby off-terminal facility to which the Commonwealth's actions forced their employer to

move.[8]

It should also be noted that the Director of the OWCP has offered an interpretation of the statute that weighs in Petitioners' favor and that merits some deference. In August 1977, the Director of OWCP issued a document titled "LHWCA Program Memorandum No. 58" in order to inform OWCP's district offices of the "OWCP's position on the amended coverage of the Act." Program Memorandum No. 58 states:

> In areas in which additional space immediately adjacent to the previously established boundaries of a waterfront pier or terminal is not available for the expansion required by modernization, . . . such facilities as "gear lockers" . . . may be located outside the fenced boundaries of a terminal. Such facilities are in practical fact integral parts of the maritime terminal . . . ; they should be regarded as extensions of the terminals to which they relate.

Prog. Mem. No. 58, at 11.[9] Because Farrell moved most

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[8] The fact that, as Judge Williams points out *ante* at 933, these policies were "wielded [by the Third Circuit] to eliminate the situs requirement altogether" is hardly grounds for choosing wholly to ignore those policies when interpreting the Act. If courts were compelled to abandon every tool of statutory construction that had ever been abused, we would be left with few tools indeed.

[9] Unlike Judge Williams, I fail to perceive how the Director's language can reasonably be construed to extend coverage to "locations as remote as Kansas City, Kansas." *See ante* at 934.

of its maritime repair activities away from the terminal only upon the Commonwealth's demand, and because the NIT and 24th Street facilities operate as a single, functionally integrated unit, the Director's interpretation of the statutory language suggests that Petitioners were injured at a situs covered by the LHWCA.

"Because the Director [of the OWCP] administers and enforces the LHWCA, this court defers to his interpretation [of that Act] unless it is unreasonable or contrary to Congressional intent." ***Zapata Haynie Corp. v. Barnard*****, 933 F.2d 256, 258 (4th Cir. 1991);** ***accord Weyher/Livsey Constructors, Inc. v. Prevetire*****, 27 F.3d 985, 987 (4th Cir. 1994);** ***Newport News Shipbuilding & Dry Dock Co. v. Howard*****, 904 F.2d 206, 208-09 (4th Cir. 1990). Indeed, we have stated that we will defer not only to the Director's reasonable administrative and policy-making decisions, but to his reasonable constructions of the Act's jurisdictional requirements as well.** ***Zapata Haynie*****, 933 F.2d at 258 n.5. Even if Program Memorandum No. 58 represents only an articulation of enforcement guidelines, rather than a formal declaration of the agency's position, it is "still entitled to some weight on judicial review."** ***Martin v. Occupational Safety and Health Review Comm'n*****, 499 U.S. 144, 157 (1991). The Director's interpretation of the Act is a reasonable one, and is therefore entitled to at least some measure of deference.**

Given the strong functional relationship existing between the NIT and 24th Street facilities, the remedial objectives spurring passage of the 1972 Amendments, our duty to interpret the Act broadly so that those objectives may be achieved, and the Director's long-standing

reasonable interpretation of the amended Act, we should hold that Petitioners sustained their respective injuries at a covered maritime situs.

III.

I have rambled on at some length to explain why the *Sidwell* case which we must follow is on shaky ground. What I have set forth here will only have relevance, however, if *Sidwell* or the instant case is reheard *en banc* or if certiorari is granted in either case by the United States Supreme Court.

APPENDIX B

Decision of the Benefits Review Board, United States Department of Labor, dated October 26, 1994: Parker; Redmon v. Farrell Lines, Inc. & Royal Ins. Co., BRB Nos. 92-982, 92-983 (1994).

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
BRB Nos. 92-982, 92-983

NOT PUBLISHED

EARL J. PARKER, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	**DATE ISSUED:**
	)	**OCT. 26, 1994**
FARRELL LINES, INC.	)	
	)	
and	)	
	)	
ROYAL INS. CO.	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	
GLENN C. REDMON	)	
	)	
Claimant-Petitioner	)	
	)	

v.)
)
FARRELL LINES, INC.)
)
and)
)
ROYAL INS. CO.)
)
Employer/Carrier-)
Respondents)

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits Under the Act of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Lee E. Wilder and John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimants.

Gerard E. W. Voyer and Brian N. Casey (Taylor & Walker, P.C.) Norfolk, Virginia, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimants appeal the Decision and Order (90-LHC-2369 and 91-LHC-467) of Administrative Law Judge Richard K. Malamphy denying benefits on claims filed

pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. [Section] 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. [Section] 921(b)(3).

Claimants appeal a denial of benefits.[1] Employer operates a container and chassis repair facility at 901 W. 24th Street in Norfolk, Virginia. Claimant Redmon, a container mechanic, tripped and fell on the steps to the office and injured his left wrist, and claimant Parker, an inspector, was injured when an electric saw kicked back while he was cutting the floor for a flat rack container and cut his left leg. The parties stipulated that compensation has been paid under the Virginia workers' compensation law. The sole issue addressed by the administrative law judge was coverage under the Act. The parties stipulated that claimants satisfy the status requirement under Section 2(3) of the Act, 33 U.S.C. [Section] 902(3). The administrative law judge concluded, however, that the situs requirement of Section 3(a), 33 U.S.C. [Section] 903(a), is not satisfied. Finding that employer's container repair shop where the injuries occurred is not a site specifically enumerated in Section 3(a), the administrative law judge focused on whether it constituted an "adjoining area" within the meaning of the Act. After a consideration of the relevant factors, the

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[1] These cases were consolidated before the administrative law judge. By Order dated March 24, 1993, the cases were consolidated on appeal for purposes of decision. 20 C.F.R. [Section] 802.104.

administrative law judge concluded that the facility is not an "adjoining area," and accordingly, he denied the claims.

On appeal, claimants contend that the administrative law judge erred in finding that the site is not an adjoining area covered under Section 3(a) of the Act. Employer responds, urging affirmance.

In analyzing whether claimants were injured on an "adjoining area" under Section 3(a),[2] the administrative law judge employed the "functional relationship" test set forth by the United States Court of Appeals for the Ninth Circuit in *Brady-Hamilton Stevedoring v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). In *Herron*, the Ninth Circuit indicated that in order to further the goal of uniform coverage, the phrase "adjoining area" in Section 3(a) should be read to describe a functional relationship between the site and navigable water that does not in all cases depend on physical contiguity with navigable waters. The court stated that in determining whether a site is an "adjoining area," consideration should be given to the

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[2] Section 3(a) of the Act provides that:

> [C]ompensation shall be payable under this chapter . . . only if the disability or death results from and injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

33 U.S.C. [Section] 903(a).

following factors:

> 1. The particular suitability of the site for the maritime uses referred to in the statute;
>
> 2. Whether adjoining properties are devoted primarily to uses in maritime commerce;
>
> 3. The proximity of the site to the waterway; and
>
> 4. Whether the site is as close to the waterway as is feasible given all of the circumstances.

Herron, 568 F.2d at 1411, 7 BRBS at 411. The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction these cases arise, while not specifically adopting the Herron test, has referred to it as a "more practical approach," *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *aff'g Humphries v. Cargill, Inc.*, 19 BRBS 187 (1986) (*en banc*), *cert. denied*, 485 U.S. 1028 (1988), and it has affirmed decisions of the Board that rely on the *Herron* factors. *Id.*; *Davis v. Doran Co. of California*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257, 22 BRBS 3 (CRT) (4th Cir. 1989).

In *Davis*, the Board affirmed the administrative law judge's finding that employer's ship propeller repair facility at 1038 W. 26th Street in Norfolk was not a covered situs. The administrative law judge therein

concluded that the surrounding area was not primarily devoted to uses in maritime commerce and the site was not chosen for its proximity to navigable waters; rather, the lease was obtained because its existing structure would accommodate the movement of ship propellers in and out of the facility. The Board held that any test which focuses only upon whether the employer's facility is utilized for a maritime purpose would effectively eliminate the situs requirement, which has been rejected by the Supreme Court. *Davis*, 20 BRBS at 125, *citing Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT) (1985); *see also Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989) (situs inquiry looks to the relationship of the place of injury with navigable waters). The Fourth Circuit affirmed the holding in *Davis* in an unpublished decision. *See also Gonzalez v. Ocean Voyage Ship Repair*, 26 BRBS 12 (1992); *Felt v. San Pedro Tomco*, 25 BRBS 362 (1992) (Stage, C.J., dissenting), *appeal dismissed sub nom. Felt v. Director, OWCP*, 11 F.3d 951, 27 BRBS 165 (CRT) (9th Cir. 1993); *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.*, No. 87-3836 (3d Cir. June 14, 1988).

In the present case, employer's facility is a five-bay garage located in a mixed-use area which is five miles from Norfolk International Terminal (NIT) and one mile from water. Evan Pierce, a real estate appraiser, testified that the area surrounding the facility includes a residential area, and light industrial and commercial areas. Tr. at 30. Other businesses include a shopping center, small contractors, a real estate office, an engineer's office, and the office of an accountant. Tr. at 38-43. He also testified that although this was the best location in relation to NIT, there was no concentration of

maritime-related business in the area. Tr. at 44.

James McDonald, employer's manager of maintenance and repair in the Norfolk area, testified that the 24th Street location was chosen for economic considerations such as convenience and cost of transporting employees to the NIT location for rotation. Tr. at 74. This location also was chosen because it already had a building on site that had been used to repair containers and offered a reasonable lease. Tr. at 73, 80.

Based on the facts of this case, there is substantial evidence to support the administrative law judge's finding that the container repair facility in the instant cases is not a covered situs under the Act. Contrary to the claimants' contention, the administrative law judge did not "ignore" testimony that this was the closest site feasible given all of the circumstances, but instead found that the other factors overrode this consideration. *See Gonzalez*, 26 BRBS at 16. Specifically, the administrative law judge determined, based on the testimony of record, that the site was not particularly suited for maritime uses, as, although there are other maritime concerns in the area, the adjoining properties were not devoted primarily to maritime commerce. *See Davis*, 20 BRBS at 124-25; *Lasofsky*, 20 BRBS at 61. The evidence also establishes that the site was chosen because of a favorable lease. *Id.* Moreover, the administrative law judge found that the site is not physically close to the water. *See Brown*, 22 BRBS at 387; *Lasofsky*, 20 BRBS at 61. As the administrative law judge's finding is in accordance with law and supported by substantial evidence, we affirm the conclusion that employer's 24th Street facility is not a site

covered under Section 3(a) of the Act.[3]

Accordingly, the administrative law judge's Decision and Order Denying Benefits Under the Act is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting [CHIEF]
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3] The administrative law judge's finding that the claimants had infrequent duty at the NIT location may be contradicted by the evidence that the claimants worked at least once a month at NIT, but this finding is harmless error, inasmuch as it is undisputed that the injuries occurred at the 24th Street facility.

CERTIFICATE OF SERVICE

BRB No. 92-0982: Earl J. Parker, Jr. v. Farrell Lines, Inc. and Royal Insurance Company (Case No. 91-LHCA-0467) (OWCP No. 05-0076128)

BRB No. 92-0983: Glenn C. Redmon, Sr. v. Farrell Lines, Inc. and Royal Insurance Company (Case No. 90-LHCA-2369) (OWCP No. 05-0074278)

I certify that this Decision and Order was sent this day to:

_____ _____

Date **Paul E. Trayers**
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APPENDIX C

Decision of Administrative Law Judge Richard K. Malamphy, dated December 30, 1991: Redmon; Parker v. Farrell Lines, Inc. & Royal Ins. Co., ALJ Nos. 90-LHC-2369, 91-LHC-467 (1991).

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
CASE Nos. 90-LHC-2369, 91-LHC-467
OWCP Nos. 5-74278, 5-76128

In the Matter of

GLENN C. REDMON, SR.,

Claimant,

and

EARL J. PARKER, JR.,

Claimant,

v.

FARRELL LINES, INC.,

Employer,

and

ROYAL INSURANCE COMPANY,

Carrier.

BEFORE: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS UNDER THE ACT

These proceedings arise from claims filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq. (hereinafter the Act).

A formal hearing in the Redmon case was held in Hampton, Virginia on June 5, 1991, at which time all parties were afforded a full opportunity to present evidence and argument as provided in the Act and the applicable regulations. The Claimant and Employer participated in the hearing and submitted post-hearing briefs.

A formal hearing in the Parker case was scheduled in Hampton, Virginia on October 25, 1991. By Order dated October 22, 1991, the hearing was cancelled at the request of the parties.

While Messrs. Redmon and Parker are separate parties and although they sustained different injuries, their claims are based on incidents occurring at the same site. The only issue in each case is situs under Section 3(a) of the Act.

Therefore, the Redmon and Parker cases have been consolidated for purposes of this decision.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The Employer and the Claimants stipulate, and I find:

1. **The Act (33 U.S.C. 5901, et seq.) applies to these cases.**

2. **An employee/employer relationship existed at all relevant times.**

3. **Mr. Redmon was injured in the course of his employment on February 5, 1990.**

4. **Mr. Parker was injured on June 11, 1990, during the course of his employment.**

5. **Employment as a container repairman and inspector satisfies the status test under the Act.**

6. **Compensation has been paid under the Virginia Workers' Compensation Act.**

7. **The parties have followed the procedures of**

the Act in a timely fashion.

ISSUE

Whether the Claimants were injured in an area which meets the situs requirement of Section 3(a) of the Act[]?

APPLICABLE LAW

The Longshore and Harbor Workers' Compensation Act provides in [Section] 3(a) that "except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."

ARGUMENTS

The Claimants state that they repair containers which are used in shipping maritime cargo. Such work was originally performed on leased space at the Norfolk International Terminal, but the port required the Employer to relocate due to space restrictions. The Employer has retained a small service area at the port but the majority of repair work is performed at the 24th

Street facility.

The Claimants were injured at the 24th Street facility, and it is argued that this was the best location for a repair facility in view of the testimony of Mr. McDonald and Mr. Pierce. Counsel argues that the Claimants meet the situs test, and Counsel cites Sawyer v. Tideland Welding Services, 16 BRBS 344 (1984) in support of the case.

The Carrier states that the 24th Street facility is in a mixed use neighborhood which includes a shopping center, small repair shops, a printing plant, and a linen service. The carrier argues that the Employer'[s] facility does not border any navigable waters or any shipyard, ship repair facility, or terminal or cargo handling area which is adjacent to navigable waters.

The Carrier argues that this site is not particularly suitable for the maritime uses referred to in the statute. The adjoining properties are not devoted primarily to uses in maritime commerce. The site is more than a mile from navigable waters and it was not chosen to be as close to the waterway as feasible, but rather for business and economic reasons not necessarily related to the proximity to navigable waters.

Counsel cites Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), Gonzales v. Ocean Voyage Ship-Repair, 22 BRBS 364 (ALJ) (1989), Brown v. Bath Iron Works, 22 BRBS 384 (1989), and Anastasio v. A. G. Ship Maintenance, 24 BRBS 6 (1990), in support of his case.

Each party has made reference to McConnell v. Bethlehem Steel Corporation, 25 BRBS 1 (1991).

EVALUATION OF THE EVIDENCE

The Employer, Farrell Lines, Inc., owns and operates ships which transport container cargo to and from ports such as Norfolk International Terminal (NIT). The Employer has a small location at NIT where company personnel inspect and perform minor repairs on incoming and outgoing loads (TR 65).[1]

The Employer operates a repair facility for empty containers at 901 24th Street in Norfolk. The company had a cramped repair space at NIT which was subject to the hazards of weather. Due to expansion at NIT, the repair facility was relocated to a five bay garage where work could be performed regardless of the weather (TR 68).

One container repairman is permanently assigned to a small site at NIT for roadability inspection and repairs. Repairmen from the 24th Street facility were often at NIT, depending on the workload. Mr. Redmon, while based at 24th Street, was occasionally sent to the NIT facility.

Mr. Redmon testified that at 24th street the

---

[1] The following abbreviations will be used as citations to the record:

EX - Employer's exhibits in the Redmon case
TR - Transcript of the Redmon case

container mechanics repaired containers and chassis for containers. Until two years ago, once a month he had gone to NIT to repair damaged containers that were being loaded or unloaded. He currently writes damage reports at the 24th Street facility (TR 14)[.] The Claimant reported that his average weekly wage was $939.22 per week.

Mr. Redmon testified that the containers came to 24th Street from NIT or were shipped by rail from other ports. Mr. Redmon stated that the 24th Street was five miles from NIT, and one mile from Lambert's Point Docks from which they had previously received containers (TR 25).

Evan Pierce, Jr., a real estate appraiser, described the area surrounding the 24th Street facility. A residential area was to the north with light industrial and commercial areas, and a railroad right of way to the south (TR-31). Mr. Pierce reported that the area contained repair shops, a neighborhood shopping center, and other miscellaneous uses (TR 39).

Mr. Pierce testified that the area was not uniquely suited for the maritime industry (TR 44). He acknowledged that the railroad tracks from Lambert's Point Docks bordered the 24th Street site (TR 48). Mr. Pierce reported that the site was in the first light industrial ares along Hampton Boulevard south of NIT (TR 53).

Other sites such as Norfolk Industrial Park and the Berkeley and Campostella areas of Norfolk were further from NIT than 24th Street (TR 55). There was a

discussion of traffic flow to NIT from 24th Street and from Norfolk Industrial Park.

James D. McDonald testified that he was Farrell's manager of maintenance and repair in the Norfolk area. In 1980, Farrell was forced by the state to leave NIT. Farrell retained a three quarter acre site at NIT for roadability inspection and minor repairs. The 24th Street site was about four and a half acres in size and contained five garage bays. The company rotated personnel between the two sites (TR 65).

Farrell made an extensive search for a repair location and settled for the 24th Street site which had been previously occupied by a container repair facility (TR 73). Selection factors included convenience for traffic and personnel, and the ability to rotate personnel (TR 74).

Mr. McDonald testified that Norfolk Industrial Park was rejected as being five miles further from NIT than the 24th Street site. Travel time between company sites was a prime consideration (TR 75). He reported that 24th Street was the most convenient site even if buildings were not on the site at the time of the lease (TR 80).

Depositions of Mr. Redmon and Mr. McDonald are of record (EX 14 and EX 13, respectively).

DISCUSSION

The parties have stipulated that each Claimant meets the status requirements of the Act. However, he

must also meet the situs provisions in the Act in order to receive compensation.

The record reflects that prior to the relocation in 1980, all container repair work was performed at NIT. However, Farrell was required to remove all activities from NIT except for the inspection lane and a small repair area. It is undisputed that container repair is an essential part of Farrell's maritime activities.

Mr. McDonald testified that the main portion of the repair facility was forced to leave NIT. The search team decided to take the 24th Street facility based on closeness to NIT and travel time. Other considerations were the existence of compatible facility and a reasonable leasing cost.

The following discussion appears at page 80 of the hearing transcript:

> "JUDGE MALAMPHY: Mr. McDonald, if you did not have 24th Street, if that were a vacant lot at this particular point in time, is there a better location for a facility than 24th Street?
>
> THE WITNESS: Not in the City of Norfolk, not downtown in that area.
>
> JUDGE MALAMPHY: Would there be anything closer or better for your company?
>
> THE WITNESS: No. It's all residential

area and it's tied up. Either the military has it or the college has it tied up."

Mr. Pierce testified that the 24th Street facility was in the first light industrial area south of NIT. Moreover, other named areas were more distant from NIT than 24th Street.

The leading case pertaining to situs in an "adjoining area" is Brady-Hamilton Stevedoring Company v. Herron, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). In that case it was held that, "Consideration should be given to the following factors, among others, in determining whether or not a site is an [']adjoining area[']' under section 903(a): the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case."

In Brown v. Bath Iron Works Corporation, 22 BRBS 384 (4th Cir. 1989), the employee worked in a facility that was some three and one-half to four and one-half miles from the shipyard. That Court cited the factors expressed in Herron, supra, and those factors are:

"1. The particular suitability of the site for the maritime uses referred to in the statute.

2. Whether adjoining properties are devoted primarily to uses in maritime commerce.

3. The proximity of the site to the waterway.

4. Whether the site is as close to the waterway as is feasible given all of the circumstances."

In Brown, supra, the Court stated that the fact that a site is used for a maritime purpose does not automatically bring it within the coverage of Section 3(a) of the Act. the situs inquiry looks to the relationship of the place of injury with navigable waters.

After reviewing the four factors cited above, I find that the 24th Street facility does meet the criteria of number four. However, the site is not particularly suitable for maritime uses, adjoining properties are not primarily devoted to maritime uses, and the site is not close to a waterway. In addition, it is not indicated that the Claimants had more than infrequent duty at NIT in the last two years.

Thus, this Administrative Law Judge concludes that the situs requirements of Section 3(a) of the Act have not been met in this case. the cited cases, including McConnell, supra, have been considered in this determination.

ORDER

Accordingly, it is ordered that the claims of Glenn C. Redmon, Sr. and Earl J. Parker, Jr. for benefits under the Longshore and Harbor Workers' Compensation

Act be denied.

RICHARD K. MALAMPHY
Administrative Law Judge

DATED: DEC. 30, 1991
Hampton, VA

APPENDIX D

Order of the United States Court of Appeals for the Fourth Circuit Filed on March 14, 1996.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EARL J. PARKER, JR.;
GLENN C. REDMON,

Petitioners,

v. **No. 94-2653**

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; FARRELL LINES, INC.; ROYAL INSURANCE CO.,

Respondents.

ORDER

Upon a poll of the active circuit judges on a sua sponte suggestion of rehearing en banc, a majority of the judges voted to deny rehearing en banc.

Chief Judge Wilkinson and Judges Russell, Widener, Wilkins, Niemeyer, Luttig and Williams voted to deny rehearing en banc. Judges Ervin, Hall,

Murnaghan, Michael and Motz voted to rehear the case en banc.

Entered at the direction of Judge Williams.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX E

Mandate of the United States Court of Appeals for the Fourth Circuit Filed on April 2, 1996.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EARL J. PARKER, JR.;
GLENN C. REDMON,

Petitioners,

v. **No. 94-2653**

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; FARRELL LINES, INC.; ROYAL INSURANCE CO.,

Respondents.

MANDATE

The judgment of this Court dated 2/9/96 takes effect today.

Bert M. Montague
CLERK

95-1840

No. 95-1562

Supreme Court, U.S.
FILED
JUN 12 1996
CLERK

In The Supreme Court Of The United States

OCTOBER TERM 1995

EARL J. PARKER, JR.
and GLENN C. REDMOND,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; UNITED STATES DEPARTMENT OF LABOR
and
FARRELL LINES, INC.; ROYAL INSURANCE COMPANY OF AMERICA,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED

Did the U. S. Court of Appeals for the Fourth Circuit err in finding that a location is not a maritime situs as defined in the Longshore and Harborworkers Compensation Act, 33 U.S.C. § 903(a) when the location is neither contiguous with navigable waters nor touches such waters, and is not within the boundary of a shipping terminal?

PARTIES TO THE PROCEEDING

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Director, Office of Workers' Compensation Programs, U.S. Department of Labor, Intervenor/Respondent[1]
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---

[1] The Director, Office of Workers' Compensation Programs was dismissed as a party respondent by the Court of Appeals for the Fourth Circuit. The Director was subsequently allowed to intervene on the side of the Petitioners. The Director is shown as a Respondent in the Petition for Writ for *Certiorari* only because of the requirements of the Rules of the Supreme Court, Rule 12.6. Respondents, Farrell Lines, Inc. and Royal Insurance Co., assert that the Director is not a proper party to these proceedings, based on this Honorable Court's decision in Director, OWCP v. Newport News Shipbuilding & Drydock Co., 115 S. Ct. 1278 (1995).

PARTIES TO THE PROCEEDING (cont.)

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---

[2] These parties have no parent or subsidiary corporate affiliations.

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No. 95-1676

IN THE
SUPREME COURT OF THE UNITED STATES

EARL J. PARKER, JR.
and
GLENN C. REDMOND
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS;UNITED STATES DEPARTMENT OF LABOR

and

FARRELL LINES, INC.; ROYAL INSURANCE COMPANY OF AMERICA

Respondents.

BRIEF IN OPPOSITION

Respondents, Farrell Lines, Inc. and Royal Insurance Co., respectfully request that this Honorable

Court deny the petition for writ of *certiorari* which seeks review of the Fourth Circuit Court of Appeals opinion below. That opinion is reported at 75 F.3d 929 and is reprinted in the petition for *certiorari* at Appendix ("App.") A.

OPINIONS BELOW

The Opinions Below were correctly set forth in the Petition for Writ of *Certiorari.*

STATEMENT OF JURISDICTION

The Petition for Writ of *Certiorari* correctly presented the Statement of Jurisdiction.

STATUTORY PROVISIONS

The statutory provision at issue in this matter was correctly stated in the Petition for Writ of *Certiorari.*

STATEMENT OF THE CASE

The Respondent, Farrell Lines Inc. ("Farrell"), transports container cargo via ships, truck, and rail. The company leases a small location at Norfolk International Terminal ("NIT") that is used for inspection of incoming and outgoing loaded containers and minor repairs on those containers. One container repairman is assigned to the NIT facility, and others rotate to NIT as the workload demands. The job duties are similar, but not the same.

Farrell performs most of its container-repair work at its main facility located at 901 West 24th Street in Norfolk ("the 24th Street site or location"), a location approximately 5 miles from NIT. Farrell moved its facility for efficiency reasons and because the NIT location was cramped with no possibility for expansion. At the 24th Street location, empty containers, chassis, and refrigeration units are received from locations all over the United

States, repaired, and dispatched to locations throughout the United States. Repairs are made to containers owned by Farrell and other companies.

The 24th Street site is located in an area of Norfolk zoned for light industrial uses and is surrounded by a residential area to the north, a railway to the south, and a mixture of small, non-maritime businesses and professional offices in the immediate vicinity. Farrell chose the 24th Street location because of its suitability for all-weather container repair, favorable lease terms, and convenience in moving traffic and personnel between locations.

The Petitioners, Earl J. Parker ("Parker") and Glenn C. Redmon ("Redmon"), were employed by Farrell as container repairmen and inspectors. Each sustained an injury in separate incidents at Farrell's 24th Street site. After receiving compensation under the Virginia Workers' Compensation Act, each petitioner filed a separate claim

under the Longshore and Harborworkers' Compensation Act ("LHWCA" or "the Act"), 33 U.S.C. § 901 *et. seq.*, seeking the greater benefits it affords.

By Decision and Order dated December 30, 1991, Administrative Law Judge Malamphy found that Farrell's 24th Street container-repair facility did not meet the situs requirements of Section 3(a) of the Act and denied Petitioners' claim for benefits. (Petitioners' App. C.) In reaching his decision, Judge Malamphy utilized the "functional relationship" test enunciated by the Ninth Circuit Court of Appeals in Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978).

Each petitioner individually requested review before the Benefits Review Board of the United States Department of Labor, the appropriate reviewing agency. By Order dated March 24, 1993, the cases were consolidated on appeal for purposes of decision. On

October 26, 1994, the Board affirmed the Administrative Law Judge's decision, also utilizing the "functional relationship" analysis.

Petitioners appealed to the United State Court of Appeals for the Fourth Circuit. In affirming the Board's decision, the Court relied upon its recent decision in Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. 1995)[3] In Sidwell, the Court considered the tests used by the Third ("employment nexus with maritime activity" test[4]), Fifth ("totality of the circumstances" test[5]),

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[3] Petitioners have requested that their Petition for Writ of *Certiorari* be consolidated with the Petition filed with this Court in Sidwell v. Express Container Services, Inc., No. 95-1569, for purposes of consideration by the Court.

[4] *See* Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629 (3rd Cir. 1976). This Honorable Court has criticized the Sea-Land decision as appearing to "essentially discard [] the situs test." Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 277 n.40 (1977).

and Ninth ("functional relationship" test[6]) Circuits, but enunciated a simpler and more straight-forward situs test which is based on the plain language of the statute and examines both location and function.

REASONS TO DENY THE WRIT

I. The Fourth Circuit Court of Appeals decision that the Petitioners were not injured on a maritime situs is consistent with the guidance provided by this Honorable Court and is not, as Petitioners assert, in direct conflict with other circuits or prior decisions of the Fourth Circuit.

This Honorable Court has not specifically addressed the question of when a situs falls within an "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a). Such considerations are fact-specific and

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[5] *See* Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981).

[6] *See* Brady-Hamilton, *supra*.

are, more appropriately, addressed by lower courts. However, this Court's prior decisions offer adequate guidance to the lower courts in determining whether a particular location meets this jurisdictional situs requirement.

As the Fourth Circuit Court of Appeals correctly recognized, the issue in this case is one of statutory construction. This Court has long recognized that in such a case, the beginning point must be the language of the statute. Where a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) (citing Demarest v. Manspeaker, 498 U.S. 184, 190 (1991)). The Fourth Circuit Court of Appeals adhered to

this principle of statutory construction in Sidwell[7], when enunciating its "plain language" test to determine whether a particular location qualifies as a maritime situs under Section 903(a) of the Act.

In 1972, Congress amended the Act to expand coverage to both navigable waters and "the adjoining land area." S. Rep. 92-1125, 92d Cong., 2d Sess. 13 (1972). In doing so, Congress legislated a "status" requirement and a "situs" requirement, both of which must be satisfied if an injured worker is to be entitled to benefits. The situs requirement limits coverage to

> [any] injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing,

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[7] The decision from which Petitioners seek their writ of *certiorari* is based upon the holding in the Sidwell decision. Further, Petitioners have requested that this Honorable Court consolidate their Petition with the writ filed in the Sidwell case.

dismantling, or building a vessel).

33 U.S.C. § 903(a).

The plain language of the LHWCA requires that covered situses actually "adjoin" navigable waters. *Id.* Petitioners urge this Honorable Court to take an expansive view of the definitions of the word "adjoin" and of the phrase "other adjoining area" so that a maritime situs would include a location miles away from navigable waters.[8] Such broad construction is clearly contradictory to Congress' intent to expand the coverage of the Act "to

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[8] The Director, OWCP, who sided with the Petitioners before the Fourth Circuit Court of Appeals, argued, in her brief before that Court, that "other adjoining areas" should be interpreted to include areas "'near' or 'neighboring' the waterfront, or within a broadly defined 'waterfront area.'" Brief of Director, OWCP at 9. In the Sidwell case, the Director asserted, in her brief before the Fourth Circuit Court of Appeals, that a situs was covered so long as it was in "the general geographic proximity" of the waterfront. Indeed, she argued that it was "entirely reasonable" to find that all of Norfolk and Portsmouth are "adjoining areas." Brief of the Director, OWCP at 46 - 47.

cover injuries occurring in the contiguous dock area related to longshore and ship repair work." S. Rep. 92-1125, 92d Cong., 2d Sess. 2 (1972). Such sweeping definitions would also violate the rule of statutory construction whereby words must be accorded their ordinary meaning (*see* Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989)) and the traditional canon of construction, *noscitur a sociis*, which dictates that words grouped in a list should be given related meaning (*see* Beecham v. United States, 114 S. Ct. 1669, 1671 (1994); Dole v. Steelworkers, 494 U.S. 26, 36 (1990)).

Further, this Honorable Court has long acknowledged that the situs test is a geographic one (*see* Director, OWCP v. Perini North River Associates, 459 U.S. 297, 324, n.32 (1983); P. C. Pfeiffer Co. v. Ford, 444 U.S. 69, 78 - 79 (1979); Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 263 - 64 (1977)) and that

there will always be a boundary to coverage which some people will cross during their employment (*see* Herb's Welding, Inc. v. Gray, 470 U.S. 414, 426 (1985); Nacirema Operating Co. v. Johnson, 396 U.S. 212, 223 - 24 (1969)). The fact that Petitioners occasionally worked at NIT, a covered situs, does not automatically convey coverage under the Act upon them when the sustained injury occurred at a worksite remote from navigable waters.

Petitioners argue that the Fourth Circuit's "plain language" test is in direct conflict with the "functional relationship" test used in the Ninth Circuit[9], the "totality of circumstances" test used in the Fifth Circuit[10], and the

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[9] Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978).

[10] Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980)(*en banc*), *cert. denied*, 452 U.S. 905 (1981).

"functional" test used in the Second Circuit.[11] Each of these tests, as well as the one announced by the Fourth Circuit in Sidwell, upon which the court decided Petitioners' case, consider both the location and function of the site where the injury occurred. The Fourth Circuit test merely places a greater emphasis upon the site's proximity to navigable waters than do the tests used in other circuits. This does not, however, create such a conflict as to require the intervention of this Honorable Court.

In Brady-Hamilton, the Court identified four factors that should be considered in determining whether a location is a covered "adjoining area": (1) the particular suitability of the site for the maritime uses referred to in the statute; (2) whether adjoining properties are devoted

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[11] Petitioners cite Triguero v. Consolidated Rail Corp., 932 F.2d 95 (2nd Cir. 1991), but concede that the Second Circuit did not delineate a specific situs test for its own use. Petition for Writ of *Certiorari* at 12.

primarily to maritime uses; (3) the proximity of the site to the waterway; and (4) whether the site is as close to the waterway as is feasible given all of the circumstances. 568 F.2d at 141. The "plain language" test of the Fourth Circuit encompasses all but the fourth factor. The "plain language" test requires that a site "be a discrete shoreside structure or facility" (Brady-Hamilton factor three) and that it be "customarily used by the employer in loading, unloading, repairing, dismantling, or building a vessel" (Brady-Hamilton factors one and two). 71 F.3d at 1139.

The court, in Texports Stevedore, concluded that an area falls within the coverage of the LHWCA if it is "neighboring" navigable waters and if it is used customarily, although not exclusively, by employers in loading, unloading, repairing, or building a vessel. 632 F.2d at 515. The court also acknowledged that the "outer limits of the maritime area [could] not be extended to extremes." 632

F.2d at 514. It is obvious that the Fourth Circuit's "plain language" test is not in direct conflict with the Texports Stevedore test as it considers the very same location and function factors; indeed, it follows the court's admonishment that there must be an outer limit to a maritime area.

As noted in footnote 11, *supra*, the court, in Triguero, did not articulate its own test, but cited with approval those used in Brady-Hamilton, Texports Stevedore, Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988), and Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978). As set forth in the preceding paragraphs, the Fourth Circuit's "plain language" test is not inconsistent with the Brady-Hamilton and Texports Stevedore tests. It also complies with the principles enunciated in Humphries and

Graham.

In an unpublished opinion, the court, in Humphries, found that "a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters." 834 F.2d at 373 (citing Perkins v. Marine Terminals Corp., 673 F.2d 1097, 1101 - 02 (9th Cir. 1982). In Graham, the court found that a situs is a maritime one when it is an "integral part [] of the shipyard" despite its distance from the waterway. 573 F.2d at 169. When the Sidwell court specifically stated that "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured" (71 F.3d at 1140, n.11), it implicitly affirmed its prior holdings in Humphries and Graham by acknowledging that an injury may occur some distance from the actual shoreline, yet still occur in an "other adjoining area" and, thus, upon a maritime situs.

Since the Act's inception, there has always been a limit to the areas qualifying as maritime situses. Originally, this limit was at the water's edge but, in 1972, Congress amended the Act to extend that limit to include adjoining areas. The Fourth Circuit's "plain language" test ensures coverage for all maritime employees injured in the waterfront areas where the loading, unloading, and repair of vessels occur, as Congress plainly intended.

Congress in amending the Act, created both a status and a situs requirement. By doing so, Congress acknowledged the Act could not provide coverage to all people working on the waterfront or to all maritime workers wherever their jobs might require them to work. Therefore, it is axiomatic that Congress implicitly recognized that some individuals would move in and out of coverage. Had Congress intended totally uniform coverage, as Petitioners would like this Court to believe, it

would have eliminated the situs requirement entirely. It did not do so. This Honorable Court should not, as Petitioners would have it do, extend the coverage of the Act so that entire geographical areas are included. If the coverage of the Act is to be extended, it is Congress who must do so, not the courts.

II. Assuming, *arguendo*, that a direct conflict does exist between the circuits and that a "functional" test is pronounced by the Court, Petitioners' injuries still did not occur on a maritime situs.

Even if it is determined that a direct conflict exists between the circuits, Petitioners' case is not an appropriate case for the Court to use to resolve the conflict. In announcing their decisions in Petitioners' cases, the Administrative Law Judge and the Benefits Review Board concluded, under the tests announced in Brady-Hamilton and Humphries, *supra*, that Petitioners' injuries did not

occur on a maritime situs.[12] These decisions, supported by substantial, credible evidence, provide an independent basis for the decision of the Fourth Circuit Court of Appeals. While Petitioners' would surely refute the correctness of such a decision, such a fact-bound conclusion raises no issue that warrants review by this Honorable Court.

III. There is no compelling reason to grant the writ.

Although Petitioners assert otherwise, there simply

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[12] These decisions were also based upon the holdings of Davis v. Doran Co. of California, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989) (a location on 26th Street in Norfolk was not a maritime situs where the surrounding area was not primarily devoted to uses in maritime commerce and the site was not chosen for its proximity to navigable waters, but because the existing structure would accommodate the movement of ship propellers in and out of the facility) and Brown v. Bath Iron Works Corp., 22 BRBS 384 (4th Cir. 1989) (a site used for a maritime purpose does not automatically bring it within the coverage of the Act; the situs inquiry looks to the relationship of the place of injury with navigable waters).

is no important federal question to be addressed in this matter. The Fourth Circuit's decision comports with decisions of this Honorable Court, with those of the other circuits, and with its own prior decisions. The Court's holding defers to the clear language of the statute. There is simply no need for this Honorable Court to expend its time defining what the statutory language makes clear.

Further, this Court has previously indicated that the question presented is not a proper matter for their consideration by denying *certiorari* in the Graham, Texports Stevedore, and Humphries cases.

Petitioners finally argue that this Honorable Court should consider this case because of the large number of longshoring cases arising in the Fourth Circuit. If there is any "broad detrimental effect which [] undermine[s] the very purpose of the Longshore Act" (Petition at 22), it is Congress, not the Court, who must address the problem.

CONCLUSION

The "plain language" test enunciated by the Fourth Circuit Court of Appeals in Sidwell and upon which the decision in this case is based adheres to the long-established principles of statutory construction and gives effect to Congress' clearly stated intent. Further, it does not contravene precedent from other federal circuits or from the Fourth Circuit itself. Petitioners' case has been properly reviewed before the Office of Administrative Law Judges, the Benefits Review Board, and the Fourth Circuit Court of Appeals. Respondent respectfully submits that the decision of the Fourth Circuit is proper and that the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

EARL J. PARKER, JR., ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 903(a), provides compensation and benefits to employees engaged in maritime employment who suffer injuries "upon the navigable waters of the United States * * * including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used" by an employer carrying out specified longshoring activities. The question presented is whether a container-repair shop near, but not immediately contiguous to, a marine terminal, is located in an "adjoining area" within the meaning of Section 903(a).

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I-XXIX) is reported at 75 F.3d 929. The decisions and orders of the Benefits Review Board (Pet. App. XXX-XXXIX) and the administrative law judge (Pet. App. XL-LI) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February, 9, 1996. A sua sponte suggestion of rehearing en banc was denied on March 14, 1996. Pet. App. LII-LIII. The petition for a writ of certiorari was

filed on May 9, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides compensation to persons who meet a "status" requirement, *i.e.*, satisfy the Act's definition of "employee," see 33 U.S.C. 902(3),[1] and have been injured at a maritime "situs." See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 (1977). This case concerns the "situs" requirement, which appears in Section 3(a) of the Act and which specifies that the Act's coverage extends to

> injur[ies] occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a).

2. Petitioners Earl J. Parker, Jr., and Glenn Redmon are an inspector and mechanic, respectively, who suffered disabling injuries while working at a container-repair facility (the 24th Street facility) maintained by their employer, respondent Farrell Lines, Inc. Pet. App. III. Respondent is a worldwide ship line that transports containerized cargo to and

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[1] Section 2(3) of the Act defines "employee," with certain exceptions not relevant here, as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3).

from various ports, including the Norfolk International Terminal (NIT). *Id.* at IV. Respondent owns the containers in which cargo is packed, and it inspects and repairs the containers as part of its shipping operations. *Ibid.*

Respondent's container inspection and repair work was performed exclusively at a leased space at NIT until 1980, when the Commonwealth of Virginia expanded the terminal and terminated respondent's lease. Pet. App. IV, XV. Respondent was thereafter able to continue to lease a small inspection and repair facility at NIT, but was compelled to transfer most of its operations to a new site on 24th Street in Norfolk, which is approximately five miles from the terminal and about one mile from navigable waters. *Ibid.* Respondent selected the 24th Street site "for a variety of reasons including proximity to [the terminal], the ease with which containers and employees could be moved between [the terminal] and the [facility], suitability of the site for container repair, and favorable lease terms." *Id.* at V. The site, which had previously been used for container repair, was the closest location to the terminal available, given zoning restrictions, and is located in a mixed-use area zoned for light industrial use. *Id.* at IV, XV, XLVIII-XLIX. Respondent's employees perform minor and ship-side repairs, as well as inspections, at NIT; major repairs (in addition to some minor repairs and inspections) are performed at the 24th Street facility. C.A. App. 13-14, 66-67.[2] While one employee is regularly assigned to NIT, repairmen from the 24th

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[2] Containers inspected and repaired at the 24th Street facility come from both the terminal and, over inland routes, from consignees. Pet. App. IV.

Street site are regularly dispatched to NIT, usually on a daily basis, to deliver parts, to conduct repairs, and to make inspections. Pet. App. IV, XV.

3. Petitioners sought compensation under the LHWCA from respondent for the injuries they sustained. Respondent conceded that petitioners met the LHWCA's "status" requirement because they were "engaged in maritime employment" by virtue of their work inspecting and repairing containers used for ocean transport and for over-the-road transfers to and from its terminal operations. Pet. App. V n.3, XLVII. Respondent contended, however, that its repair facility was not a covered "situs" under the Act, and it therefore paid petitioners only the lesser compensation provided by Virginia workers' compensation law. *Id.* at V.

In a consolidated decision on petitioners' LHWCA claims, an administrative law judge (ALJ) ruled that the repair shop was not a covered situs. Pet. App. XL-LI. Applying a four-factor test derived from the Ninth Circuit's decision in *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (1978), the ALJ concluded that the site is not particularly suited for maritime uses; that adjoining properties are not primarily devoted to maritime uses; and that the site, while as close to the waterway as is feasible given all of the circumstances, is not close to a waterway. Pet. App. XLIX-L. The ALJ also emphasized that neither of the claimants had more than infrequent duty at the terminal during the last two years. *Id.* at L.

4. The Benefits Review Board affirmed. Pet. App. XXX-XXXIX. The Board approved the ALJ's use of the *Brady-Hamilton* "'functional relationship' test," noting that the Fourth Circuit had affirmed Board decisions employing that standard. *Id.* at XXXIII-

XXXIV. It rejected petitioners' contention that the ALJ had ignored the fact that the repair facility was the closest feasible site to the terminal, and it concluded that the ALJ had permissibly based its ruling against coverage on the other *Brady-Hamilton* factors, which weighed against coverage. *Id.* at XXXVI.

5. Petitioners sought review of the Board's decision in the United States Court of Appeals for the Fourth Circuit. On December 28, 1995, while their petition for review was pending, the Fourth Circuit issued its decision in *Sidwell* v. *Express Container Services, Inc.*, 71 F.3d 1134 (1995), cert. denied, No. 95-1569 (June 24, 1996). The court in *Sidwell* held that a container–repair facility located eight-tenths of a mile from a waterfront terminal was not a covered situs under Section 3(a). 71 F.3d at 1141. The court explained that the "adjoining area" to which Section 903(a) refers must be "'contiguous with' or otherwise 'touch[]' [navigable] waters. If there are other areas between the navigable waters and the area in question, the latter area simply is not 'adjoining' the waters under any reasonable definition of that term." 71 F.3d at 1138-1139 (footnote omitted). The court acknowledged that "dictionaries do include 'neighboring' and 'in the vicinity of' as possible definitions of 'adjoining,'" but it stated that "such is not the ordinary meaning of the word." *Id.* at 1138. The court also rejected the contention that "the word 'area' is sufficiently broad that the phrase 'adjoining area' still covers the site where Sidwell's injury occurred." *Id.* at 1139.[3] On January 29, 1996, the court of appeals sua

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[3] In a concurring opinion, District Judge Beaty stated that he would endorse the Ninth Circuit's *Brady-Hamilton* test and

sponte considered a suggestion for rehearing en banc in *Sidwell* and denied the suggestion in an eight to five vote.

6. Eleven days later, the court of appeals issued a decision in the instant case, holding that under *Sidwell* the 24th Street facility was not an LHWCA "situs." Pet. App. I-XXIX. In a quorum decision, both participating judges concluded that resolution of the case was controlled by *Sidwell*.[4] Judge Williams stated that "[b]ecause the 24th Street site neither is contiguous with navigable waters, nor touches such waters, nor is located within the boundaries of NIT, it cannot be a maritime situs under the LHWCA." *Id.* at VII. Judge Williams also stated that in her view, "*Sidwell* correctly rested on the plain language of the statute." *Id.* at IX.

Judge Murnaghan concurred, agreeing that under the approach employed in *Sidwell*, petitioners' injuries were not sustained at a maritime situs. He expressed the view, however, that *Sidwell* had articulated an unduly restrictive standard for resolving the situs inquiry. In Judge Murnaghan's view, the statute requires "a strong functional relationship between [navigable] waters and the site of the injury." Pet. App. XXII. He believed as well that "the word 'adjoining' encompasses not only a strict notion of contiguity, but also a more relaxed notion of two

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would affirm the ALJ's ruling under that standard. 71 F.3d at 1142-1143. In his view, the majority's construction of Section 3(a) rendered the "other adjoining area" phrase of the provision superfluous and was therefore incorrect. 71 F.3d at 1142.

[4] Justice Powell was a member of the panel that heard oral argument, but he did not participate in the decision. Pet. App. II n.1.

things being located within the general vicinity of each other." *Id.* at XXIV.

Judge Murnaghan also stated that "[t]he policy considerations underlying the passage of the 1972 Amendments [to the LHWCA] should further persuade us that the 24th Street facility is a covered situs," explaining that those amendments were intended to expand the Act's reach landward so as to reduce the frequency with which workers pass in and out of the Act's coverage. Pet. App. XXVI. He noted as well that a more expansive reading of the Act was supported by a 1977 memorandum issued by the Director of the Office of Workers' Compensation Programs (OWCP).[5] *Id.* at XXVII-XXVIII. Judge Murnaghan concluded:

> Given the strong functional relationship existing between the NIT and 24th Street facilities, the remedial objectives spurring passage of the 1972 Amendments, our duty to interpret the Act broadly so that those objectives may be achieved, and the Director's long-standing reasonable interpretation of the amended Act, we should hold that Petitioners sustained their respective injuries at a covered maritime situs.

Id. at XXVIII-XXIX.

The court of appeals subsequently considered sua sponte a suggestion of rehearing en banc and, in a seven to five vote, denied the suggestion. Pet. App. LII-LIII.

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[5] The Director of the OWCP was granted intervenor status in this case in the court of appeals, see Pet. App. X-XIII, and is therefore a respondent in this Court.

ARGUMENT

This case presents the same question as did the petition for a writ of certiorari in *Sidwell* v. *Express Container Services, Inc.*, No. 95-1569, which this Court denied on June 24, 1996. Essentially for the reasons stated in our brief in opposition in *Sidwell*, we believe that the petition in the instant case should also be denied.[6] If the court of appeals' opinion in *Sidwell* is read to require strict contiguity between a particular place of business and navigable waters, its holding creates a conflict among the circuits and would subvert the effective implementation of the LHWCA. We believe, however, that the opinion is susceptible of a more limited reading. Even if a square circuit conflict existed, moreover, the instant case would be an inappropriate vehicle for its resolution.

1. Prior to the Fourth Circuit's decision in this case, the courts of appeals had consistently held that a maritime facility may be covered by Section 903(a) even if it is not contiguous to navigable waters. See, *e.g.*, *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (9th Cir. 1978); *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981). That view is consistent with the position of the OWCP, as articulated most formally in LHWCA Program Memorandum No. 58, at 10-11 (Aug. 10, 1977). See 95-1569 Gov't Br. in Opp. at 11-12. That view is also consistent with the history and purpose of Section 903(a), which indicate that the LHWCA's coverage may extend to a maritime facility that is not itself strictly contiguous

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[6] We have furnished counsel for the other parties in this case with a copy of our brief in opposition in *Sidwell*.

to navigable waters. See 95-1569 Gov't Br. in Opp. at 13-15. A rigid requirement that particular places of business be directly contiguous to navigable waters, by contrast, would "reenact the hard lines that caused longshoremen to move continually in and out of coverage * * * [and] frustrate the congressional objectives of providing uniform benefits and covering land-based maritime activity." *Texports Stevedore*, 632 F.2d at 514-515.

2. As we explain in our brief in opposition in *Sidwell* (see 95-1569 Br. in Opp. at 15-16), we do not believe that the Fourth Circuit has unambiguously articulated such a rigid rule. Until the Fourth Circuit has considered the application of Section 903(a) to a broader range of factual settings, we believe that review by this Court would be premature. We also believe that this case (like *Sidwell*) furnishes an inappropriate vehicle for resolution of any conflict that might be thought to exist. Both the ALJ and the Board applied a multi-factor test based upon the Ninth Circuit's decision in *Brady-Hamilton*, and both concluded that the facility where petitioners were injured was not a covered situs. See Pet. App. XXX-XXXIX, XL-LI. Although one member of the court of appeals panel reached the opposite conclusion, see *id.* at XXVIII-XXIX, it remains unclear whether petitioners could prevail even if the Court accepted their arguments with respect to the applicable legal standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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